TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 271

BALTIMORE STEAMSHIP COMPANY AND UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, PETITIONERS

vs.

VERNON PHILLIPS, AN INFANT, BY VERNON PHILLIPS HIS GUARDIAN AD LITEM

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 20, 1926
CERTIORARI GRANTED MARCH 8, 1926

(81624)

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1 In United States Circuit Court of Appeals for the Second Circuit

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Writ of error

THE UNITED STATES OF AMERICA,
Second Judicial Circuit, ss:

The President of the United States, to the honorable judge of the District Court of the United States for the Eastern District of New York, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between Vernon Philipps, plaintiff, and Baltimore Steamship Company and United States Shipping Board Emergency Fleet Corporation, defendants, a manifest error hath happened, to the great damage of the said Baltimore Steamship Company and United States Shipping Board Emergency Fleet Corporation, defendants, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with
2 all things concerning the same, to the United States Circuit Court of Appeals for the Second Circuit, together with this writ, so that you have the same at New York City, in said circuit on the 7th day of February, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 9th day of January, 1925, A. D., in the one hundred and forty-ninth year of the Independence of the United States of America.

PERCY G. B. GILKES,
Clerk.

By J. G. COLBRAN,
Deputy Clerk.

Allowed January 9, 1925.
[SEAL.]

EDWIN L. GARVIN,
U. S. District Judge.

3 [Summons omitted in printing.]

4 In Supreme Court of New York

VERNON PHILIPPS, AN INFANT, BY VERNON PHILIPPS, HIS GUARDIAN AD litem, plaintiff,

against

BALTIMORE STEAMSHIP COMPANY AND UNITED STATES SHIPPING Board Emergency Fleet Corporation, defendants.

Bill of complaint

The plaintiff above named, by Edgar J. Treacy, his attorney, complaining of the defendants, alleges:

I. Upon information and belief that at all of the times hereinafter mentioned the above-named defendant, Baltimore Steamship Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and at all of said times was and is doing business within this State, with an office for the regular transaction of business in the Borough of Manhattan, City, County, and State of New York.

II. Upon information and belief that at all of the times hereinafter mentioned the above-named defendant, United States Shipping Board Emergency Fleet Corporation, was and still is a corporation organized and existing under the laws of the
5 District of Columbia, under the authority of an act of Congress.

III. Upon information and belief that at all of the times hereinafter mentioned, the above named defendant United States Shipping Board Emergency Fleet Corporation was and still is a corporation organized and existing under the laws of the District of Columbia and at all of said times was and is doing business within this State with an office for the regular transaction of business in the Borough of Manhattan, City, County and State of New York.

IV. Upon information and belief that at all of the times hereinafter mentioned, the defendant Baltimore Steamship Company owned or leased a certain steamship known as the "West Cape."

V. Upon information and belief that at all of the times hereinafter mentioned, the defendant United States Shipping Board Emergency Fleet Corporation owned or leased a certain steamship known as the "West Cape."

VI. Upon information and belief that at all of the times hereinafter mentioned, the defendant Baltimore Steamship Company operated and controlled a certain steamship known as the "West Cape."

VII. Upon information and belief that at all of the times hereinafter mentioned, the defendant United States Shipping Board Emergency Fleet Corporation operated and controlled a certain steamship known as the "West Cape."

6 VIII. Upon information and belief that at all of the times hereinafter mentioned, the above named steamship "West Cape" was employed as a merchant vessel.

IX. Upon information and belief that at all of the times hereinafter mentioned, plaintiff was in the employ of the above named defendants on board the steamship "West Cape" in the capacity of able-bodied seaman at the monthly rate of wages of $72.50 together with maintenance.

X. On information and belief that it was the duty of the defendants to provide plaintiff with a sufficient number of competent coemployees with which to work, and to promulgate and enforce proper and safe rules and methods for the safe conduct of said work and to warn the plaintiff of the dangers arising and to be encountered therein, and to conduct and carry on said work in a safe and proper manner.

XI. That by reason of the negligent failure of the defendants and each of them to perform the foregoing duties, on or about July 24th, 1921, while plaintiff was employed on board the said steamship "West Cape," and while engaged in working in a hold of the vessel under the order and direction of his superiors, while the ship was under way, a portion of the crew were ordered to take some dunnage out of the hold when a considerable sea was running and only a part of the hatch covering over the said hold was removed and the dunnage was caused to be dragged from underneath the hatch in such a manner by means of a winch, so that the dunnage or whip caught under the strong back supporting a portion of the
7 hatch which had not been removed and jerked it out of the socket causing it to fall into the hold upon the plaintiff without any fault on his part, so that he was seriously and permanently injured.

XII. That the injuries to the plaintiff were directly caused by the negligence of the defendants and of the officers and their seamen in their employ in their negligent and reckless control and operation of said vessel and of said winch and appliances on the said vessel and in their operation thereof, in their disregard of the rights, presence, and safety of the plaintiff, and in their failure to give warning to the plaintiff of the impending danger.

XIII. Upon information and belief that by virtue of the act of Congress approved June 5th, 1920, known as the merchant marine act, amendatory to the act of Congress known as the seamen's act of 1915, and by virtue of the provisions of section 20 of said act, plaintiff is entitled to all of the favorable provisions of the various acts of Congress relating to the rights of railroad employees when injured while engaged in interstate commerce and plaintiff is entitled to recover for the negligence of the persons in defendants' employ who caused or permitted said condition to exist as aforesaid, and whose negligence resulted in said injuries to plaintiff.

XIV. That plaintiff was thereby rendered sick, sore, lame, and disabled, and his leg was amputated above the knee and he has been and will be prevented from working, and he has lost and will lose large sums of money which he otherwise would have earned, and he has suffered and will suffer great pain and he has been per-

8 manently injured, all to his damage in the sum of one hundred thousand ($100,000) dollars.

XV. That on or about the 21st day of May, 1923, by an order of this court, Vernon Philipps was duly appointed guardian ad litem of the infant, Vernon Philipps, for the purpose of instituting an action against the above-named defendants for the cause of action set forth in this complaint.

Wherefore, the plaintiff demands judgment against the defendants for the sum of one hundred thousand ($100,000) dollars, together with the costs and disbursements of this action.

EDGAR J. TREACY,
Attorney for Plaintiff
(#15 Park Row, Borough of Manhattan, City of New York).

Duly sworn to by Edgar J. Treacy. Jurat omitted in printing.

9–10 In Supreme Court of New York

[Title omitted.]

Notice for Removal

SIRS: Please take notice, that I will present the petition of the defendants, Baltimore Steamship Company and United States Shipping Board Emergency Fleet Corporation, for the removal of this cause from the Supreme Court of the State of New York, County of Nassau, into the United States District Court for the Eastern District of New York, together with the bond on removal as provided for in section 29 of the Federal Judicial Code, at special term,
11 Part II of the Supreme Court, Kings County, on the 11th day of June, 1923.

Dated, New York, June 8, 1923.

Yours, etc.,

RALPH C. GREENE,
U. S. Attorney.

Edgar G. Wandless, of counsel, attorney for Deft., U. S. Shipping Board Emergency Fleet Corporation, office & postoffice address, 45 Broadway, Borough of Manhattan, New York City.

To Edgar J. Treacy, Esq., attorney for plaintiff, office & P. O. address, 15 Park Row, Borough of Manhattan, New York City.

12 In Supreme Court of New York

[Title omitted.]

Petition for removal

To the Supreme Court of the State of New York, County of Nassau:

The petition of the Baltimore Steamship Company and United States Shipping Board Emergency Fleet Corporation, the above-

named defendants, for the removal of the above-entitled action into the United States District Court for the Eastern District of New York, respectfully shows:

First. That this is a suit of a civil nature and hat the amount in controversy at the time of the commencement of this action and at the present time exceeds the sum of three thousand ($3,000) dollars, exclusive of interest and costs.

Second. That this action was commenced in the Supreme Court, Nassau County, on the 22nd day of May, 1923, by the service
13 of a summons and complaint upon the defendants, Baltimore Steamship Company and United States Shipping Board Emergency Fleet Corporation, and that the time within which the defendants are required by the Laws of the State of New York, or any Rule of this court, or any of the Rules of General Practice, to answer or otherwise plead to the complaint in this action, has not yet expired, and defendants have not heretofore in any wise pleaded in this action.

Third. That the defendant, Baltimore Steamship Company, was at the time of the commencement of this action and now is a foreign corporation, duly organized and existing under and by virtue of the Laws of the State of Delaware, and a citizen and resident of said State and not otherwise: that the defendant, United States Shipping Board Emergency Fleet Corporation, was at the time of the commencement of this action and now is a resident of the District of Columbia, having been duly incorporated under and by virtue of the Laws of the District of Columbia, pursuant to a certain act of Congress approved September 7, 1916, and entitled "An act to establish a United States Shipping Board, etc."

Fourth. That the cause of action upon which the plaintiff sues is one arising under the Constitution and Laws of the United States, to wit, the provisions of said act of Congress approved September 7, 1916, and that the petitioners pursuant to Sections 28 and 29 of the United States Judicial Code desire to remove this action from the Supreme Court, Nassau County, State of New York, into the District Court of the United States for the Eastern Dis-
14 trict of New York, and offer herewith a bond with good and sufficient security for its entering into the District Court of the United States for the Eastern District of New York within thirty days from the filing of this petition on a certified copy of the record in this suit and for paying all costs that may be awarded by said District Court of the United States if said District Court should hold that such suit was wrongfully or improperly removed thereto.

Wherefore, the petitioners pray that said bond be approved and that this suit be removed into the District Court of the United

States for the Eastern District of New York, and that no further proceedings be had herein in this court.

Dated, New York, June 8, 1923.

BALTIMORE STEAMSHIP COMPANY,
By JAS. E. LIGHS.
UNITED STATES SHIPPING BOARD
EMERGENCY FLEET CORPORATION,
By E. A. BRENNAN.

Ralph C. Greene, U. S. Attorney; Edgar G. Wandless, of counsel, attorney for petitioner, U. S. Shipping Board Emergency Fleet Corp., office and post-office address, 45 Broadway, Borough of Manhattan, New York City.

Nathan A. Smyth, attorney for petitioner Baltimore Steamship Company, office and post-office address, 45 Broadway, Borough of Manhattan, New York City.

15 *Duly sworn to by Jas. E. Lighs & E. A. Brennan; jurats omitted in printing.*

17 Bond on removal for $500.00 approved; omitted in printing.

20 In United States District Court for the Eastern District of New York

VERNON PHILIPPS, AN INFANT BY VERNON PHILIPPS, HIS GUARDIAN ad litem, plaintiff

against

BALTIMORE STEAMSHIP COMPANY AND UNITED STATES SHIPPING Board Emergency Fleet Corporation, defendants

Answer of Defendant, United States Shipping Board Emergency Fleet Corporation

The defendant, United States Shipping Board Emergency Fleet Corporation, by Ralph C. Greene, United States Attorney, Edgar G. Wandless of counsel, for its answer to the complaint herein alleges:

First. That it denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "first" of the complaint herein.

Second. That it denies upon information and belief each and every allegation contained in paragraphs "fourth" and "fifth" of the complaint herein.

Third. That it denies upon information and belief each and
21 every allegation contained in paragraph "sixth" of the complaint herein, except that it admits that the defendant, Baltimore Steamship Company, was operating the Steamship "West Cape," on the date of plaintiff's alleged injury, as agent for the United States of America in accordance with the terms of a certain

contract to which this defendant begs leave to refer upon the trial of this action.

Fourth. That it denies upon information and belief each and every allegation contained in paragraphs "seventh," "ninth," "tenth" and "eleventh" and "twelfth" of the complaint herein.

Fifth. That it denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "thirteenth" of the complaint herein.

Sixth. That it denies upon information and belief each and every allegations contained in paragraph "fourteenth" of the complaint herein.

Seventh. That it denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "fifteenth" of the complaint herein.

Further answering the said complaint and for a first, separate and complete defense to the plaintiff's alleged cause of action, the defendant alleges, upon information and belief:

Eighth. That it repeats and reiterates each and every admission, allegation and denial contained in paragraphs "first" to "seventh" inclusive of this answer, and alleges:

22

Ninth. That on or about the 24th day of July, 1921, the steamship "West Cape" was and now is a merchant vessel belonging to the United States of America and duly documented and registered in the name of the said United States of America, and that this action is in effect a suit against the United States of America, and whatever rights, if any, the plaintiff may have by reason of the facts alleged in the complaint herein arose out of and are founded exclusively upon the Constitution and Laws of the United States of America, and particularly the act of Congress approved March 9, 1920, authorizing suits against the United States of America in Admiralty which act the defendant, United States Shipping Board Emergency Fleet Corporation, pleads in bar of the plaintiff's recovery in this action.

Further answering the said complaint and for a second, separate and complete defense to the plaintiff's alleged cause of action, the defendant alleges upon information and belief:

Tenth. That it repeats and reiterates each and every admission, allegation and denial contained in paragraphs "first" to "seventh" inclusive of this answer, and further alleges:

Eleventh. That on or about the 24th day of July, 1921, and at all the times mentioned in the complaint herein, the steamship "West Cape" was and now is a merchant vessel belonging to the United States of America and duly documented and registered in the name of the said United States of America; that the defendant, United States Shipping Board Emergency Fleet Corporation, did not, on the 24th day of July, 1921, nor at any time prior or subsequent to that date, own or control under charter the said steamship "West Cape," referred to in the complaint herein.

23

Further answering the said complaint and for a third, separate and complete defense to the plaintiff's alleged cause of action, the defendant alleges upon information and belief:

Twelfth. That it repeats and reiterates each and every admission, allegation and denial contained in paragraphs "first" to "eleventh" inclusive of this answer, and further alleges:

Thirteenth. That at the time of the plaintiff's alleged damage and injury the said steamship "West Cape" was owned by the United States of America. The cost of her operation and expenses arising from said operation were paid by the United States of America, the owner and the United States of America received the revenues from the operation of said steamship at said time and place. The United States of America as owner was operating said steamship for its own account through the defendant, Baltimore Steamship Company, a shipping agency as managing operator, and this defendant was not manning, equipping or victualling said
24 ship for its own account or by its own procurement. At the time of the plaintiff's alleged damage and injury, said Baltimore Steamship Company had full charge and control of the operation, management, equipment, manning and victualling of said steamship. The master, officers, and crew of said steamship were employed by said Baltimore Steamship Company, and this defendant did not employ said master, officers, and crew, and said master, officers and crew and any and all other persons in charge of said steamship at said time and place were acting as agents of the owner, the United States of America.

Further answering the said complaint and for a fourth, separate and complete defense to the plaintiff's alleged cause of action, the defendant alleges upon information and belief:

Fourteenth. That it repeats and reiterates each and every admission, allegation and denial contained in paragraphs "first" to "seventh" inclusive of this answer, and further alleges:

Fifteenth. Heretofore and on or about the 20th day of October, 1921, the plaintiff herein suing by Vernon L. Philipps as his next friend instituted an action in the United States District Court for the District of Maryland against the United States of America and the United States Shipping Board Emergency Fleet Corporation and the Baltimore Steamship Company, the two last named being the defendants in this action to recover damages for injuries alleged to have been sustained by said plaintiff on or about July 24, 1921, on
25 the steamship "West Cape." The said action was based on the same injuries and the same alleged cause of action which is set forth in the complaint herein. These defendants thereafter interposed exceptions and an answer to the plaintiff's libel in said action in the said United States District Court for the District of Maryland and said action thereupon came on for trial on or about the 21st day of December, 1922, and trial was thereupon had by said court on the merits in said action. Thereafter on or about February 19, 1923, the said court rendered a decree in favor of the said libellant

who is the plaintiff in this action and against the respondents in said action including the defendants in this action in the sum of five hundred dollars ($500.00). The said decree in the sum of five hundred dollars ($500.00) was thereafter discharged and satisfied on or about the 21st day of March, 1923, by payment of said sum of five hundred dollars ($500.00) to the said libellant who is the plaintiff in this action. By said decree and the satisfaction threof, the matters herein in litigation were finally adjudicated and settled and the plaintiff is therefore debarred from prosecuting this action.

Wherefore this defendant demands judgment dismissing the complaint herein, together with the costs and disbursements of this action.

RALPH C. GREENE,
U. S. Attorney, Attorney for Defendant,
United States Shipping Board Emergency Fleet Corporation.

Edgar G. Wandless, of counsel, office & P. O. address, 45 Broadway, Borough of Manhattan, City of New York.

26 Duly sworn to by E. A. Brennan. Jurat omitted in printing.

27 In United States District Court

Answer of defendant, Baltimore Steamship Company

[Title omitted.]

The defendant, Baltimore Steamship Company, by Nathan A. Smyth, its attorney, for its answer to the complaint herein, alleges:

First. That it denies upon information and belief each and every allegation contained in paragraphs "fourth" and "sixth" of the complaint herein, except that it admits that it was acting as managing operator of said steamship "West Cape" for the United States of America, pursuant to the terms of a certain agreement which this defendant begs leave to refer to and produce upon the trial of this action with the same force and effect as if same were hereto annexed and incorporated herein.

28 Second. That it denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "fifth" of the complaint herein.

Third. That it denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "seventh" of the complaint herein.

Fourth. That it denies upon information and belief each and every allegation contained in paragraphs "ninth," "tenth," "eleventh," and "twelfth" of the complaint herein.

Fifth. That it denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in paragraph "thirteenth" of the complaint herein.

Sixth. That it denies upon information and belief each and every allegation contained in paragraph "fourteenth" of the complaint herein.

Seventh. That it denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "fifteenth" of the complaint herein.

Further answering the said complaint and for a first, separate, and complete defense to the plaintiff's alleged cause of action, the defendant alleges upon information and belief:

29 Eighth. That it repeats and reiterates each and every admission, allegation, and denial contained in paragraphs "first" to "seventh," inclusive, of this answer, and alleges:

Ninth. That on or about the 24th day of July, 1921, the steamship "West Cape" was and now is a merchant vessel belonging to the United States of America and duly documented and registered in the name of the said United States of America, and that this action is in effect a suit against the United States of America, and whatever rights, if any, the plantiff may have by reason of the facts alleged in the complaint herein arose out of and are founded exclusively upon the Constitution and laws of the United States of America, and particularly the act of Congress approved March 9, 1920, authorizing suits against the United States of America in Admiralty, which act the defendant, Baltimore Steamship Company, pleads in bar of the plaintiff's recovery in this action.

Further answering the said complaint and for a second, separate, and completed defense to the plaintiff's alleged cause of action, the defendant alleges upon information and belief:

Tenth. That it repeats and reiterates each and every admission, allegation, and denial contained in paragraphs "first" to "ninth" inclusive, of this answer, and further alleges:

Eleventh. That on or about the 24th day of July, 1921, and at all the times mentioned in the complaint herein, the steamship

30 "West Cape" was and now is a merchant vessel belonging to the United States of America and duly documented and registered in the name of the said United States of America; that the defendant, Baltimore Steamship Company, did not, on the 24th day of July, 1921, nor at any time prior or subsequent to that date, own or control under charter the said steamship "West Cape," referred to in the complaint herein.

Further answering the said complaint and for a third, separate, and complete defense to the plaintiff's alleged cause of action, the defendant alleges upon information and belief:

Twelfth. That it repeats and reiterates each and every admission, allegation, and denial contained in paragraphs "first" to "seventh," inclusive, of this answer, and further alleges:

Thirteenth. That at all the times mentioned in the complaint herein, the steamship "West Cape" was fully provided with proper equipment and appliances; that said equipment and appliances were in all respects in proper condition and seaworthy; that the said

steamship "West Cape" was in all respects seaworthy, and if any injury or illness was incurred by plaintiff at the time and place, or on the occasion mentioned in the complaint, such injury or illness was caused in whole or in part or was contributed to by negligence and want of care on the part of the plaintiff, and was due to an open or obvious risk assumed by him in the business in which
31 he was engaged, and without any fault or negligence on the part of the steamship "West Cape," its owners, officers, or crew, or any one for whom they may have been responsible.

Further answering the said complaint and for a fourth, separate and complete defense to the plaintiff's alleged cause of action, the defendant alleges upon information and belief:

Fourteenth. That it repeats and reiterates each and every admission, allegation, and denial contained in paragraphs "first" to "seventh," inclusive, of this answer, and further alleges:

Fifteenth. Heretofore and on or about the 20th day of October, 1921, the plaintiff herein suing by Vernon L. Philipps as his next friend instituted an action in the United States District Court for the District of Maryland against the United States of America and the United States Shipping Board Emergency Fleet Corporation and the Baltimore Steamship Company, the two last named being the defendants in this action to recover damages for injuries alleged to have been sustained by said plaintiff on or about July 24, 1921, on the steamship "West Cape." The said action was based on the same injuries and the same alleged cause of action which is set forth in the complaint herein. These defendants thereafter interposed exceptions and an answer to the plaintiff's libel in said action in the said United States District Court for the District of Maryland and said action thereupon came on for trial on or about the 21st day of Decem-
32 ber, 1922, and trial was thereupon had by said court on the merits in said action. Thereafter, on or about February 19, 1923, the said court rendered a decree in favor of the said libellant who is the plaintiff in this action and against the respondents in said action including the defendants in this action in the sum of five hundred dollars ($500.00). The said decree in the sum of five hundred dollars ($500.00) was thereafter discharged and satisfied on or about the 21st day of March, 1923, by payment of said sum of five hundred dollars ($500.00) to the said libellant who is the plaintiff in this action. By said decree and the satisfaction thereof, the matters herein in litigation were finally adjudicated and settled and the plaintiff is therefore disbarred from prosecuting this action.

Wherefore, this defendant demands judgment dismissing the complaint herein together with the costs and disbursements of this action.

NATHAN A. SMYTH,
Attorney for Defendant, Baltimore S. S. Co.

Office & P. O. address, 45 Broadway, Borough of Manhattan, City of New York.

33 Duly sworn to by James E. Light; jurat omitted in printing.

34 In United States District Court

[Title omitted.]

Judgment

The issues in the above entitled action having been duly brought on for trial before Honorable Edwin L. Garvin, United States District Judge, and a jury, at a term of the United States District Court for the Eastern District of New York, held in the United States Courthouse and Post Office Building, in the Borough of Brooklyn, city of New York, on the 6th and 7th days of October, 1924, and the defendants appearing by counsel, and the issues herein having been duly tried and a verdict having been duly rendered on the 7th day of October, 1924, in favor of the plaintiff and against the defendants for the sum of forty thousand ($40,000) dollars, and the costs of the plaintiff herein having been duly adjusted at $32.75,

Now on motion of Edgar J. Treacy, attorney for the plaintiff, it is

35 Ordered, adjudged, and decreed that the plaintiff Vernon Philipps, do recover of the defendants, Baltimore Steamship Company and United States Shipping Board Emergency Fleet Corporation, the sum of forty thousand ($40,000) dollars, together with $32.75 costs as taxed, amounting in all to the sum of forty thousand and thirty-two 75/100 dollars ($40,032.75), and that the plaintiff have execution therefor, accordingly.

Judgment entered this 10th day of October, 1924.

By the court.

PERCY G. B. GILKES,
Clerk.

By J. G. COLBRAN,
Deputy Clerk.

36 In United States District Court

[Title omitted.]

Order denying motion for new trial October 9, 1924

The issues in the above entitled action having come on for trial before me and a jury, on the 6th and 7th days of October, 1924, and the jury having rendered a verdict in favor of the plaintiff and against the defendants for the sum of forty thousand ($40,000) dollars, on the 7th day of October, 1924, and the defendants having moved immediately upon the rendition thereof, upon the Judge's minutes, to set aside the verdict and for a new trial upon the grounds

that the said verdict was contrary to law, contrary to the evi-
37 dence and against the weight of evidence, and upon all the grounds mentioned in section 549 of the New York civil practice act, except insufficiency of damages; and after hearing J. Ralph Hilton, Esq., of counsel for the defendants, insupport of said motion, and Edgar J. Treacy, Esq., counsel for plaintiff in opposition thereto, and due deliberation having been had thereof, it is

Ordered that the said motion be, and the same hereby is, in all respects denied.

EDWIN L. GARVIN,
U. S. D. J.

38 In United States District Court

[Title omitted.]

Before Honorable EDWIN L. GARVIN, J., and a jury

Bill of exceptions

Be it remembered that afterward, to wit: On the 9th day of January, 1924, at a stated term of the said court, begun and holding in Brooklyn, in and for the Eastern District of New York, before his honor Robert A. Inch, district judge, after the issue joined in the above-stated cause between the said parties, and upon a stipulation entered into by the parties herein, dated January 8, 1924, as follows:

39 In United States District Court

[Title omitted.]

Stipulation re plea of res adjudicata

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the separate affirmative defense contained in the fifteenth paragraph of the defendants' answer wherein the defendants set up the plea of res adjudicata shall be argued and settled by the court before the said case is tried, and that the same exhibits attached to the motion to dismiss which was entered on August 8th, 1923, and argued on August 15th, 1923, shall be used in the argument and settlement of said plea contained in defendants' answer, and that the true test copies of the decree of the court in the United States Court for the District of Maryland and the entry of satisfaction of said decree which bear the signature of the

clerk of said court, but which do not contain the official seal of
40 said court, are acknowledged to be true copies of said documents and no question will be raised as to their authenticity by reason of the lack of said official seal of the court.

Dated, New York, January 8th, 1924.

EDGAR J. TREACY,
Attorney for Plaintiff.
RALPH GREENE,
U. S. Attorney,
Attorney for Defendant United States Shipping Board Emergency Fleet Corp.

Edgar G. Wandless, of counsel.

NATHAN A. SMYTH,
Attorney for Defendants, Baltimore Steamship Co.

Jos. M. Dreyer, of counsel.

There came on to be heard, before the said judge, a motion for judgment on the pleadings, on the plea of res judicata alleged in the separate affirmative defense contained in the 15th paragraph of the defendants' answer, at which time the attorney for the plaintiff filed with the court an affidavit in opposition to said motion, as follows:

41 In Supreme Court of New York

[Title omitted.]

Affidavit of Edgar J. Treacy

CITY AND COUNTY OF NEW YORK, *ss:*

Edgar J. Treacy, being duly sworn, deposes and says: I am the attorney for the plaintiff in this action.

This action is brought to recover damages for personal injuries sustained by the plaintiff on July 24, 1921, while on board the steamship "West Cape," operated and controlled by the defendants. The cause of action is predicated on the negligence of the seamen and subordinate officers of the ship and is similar to the actions brought under the United States statutes in cases of personal injury to railway employees.

42 Prior to the commencement of this action an action was brought in admiralty by the plaintiff against the defendants for indemnity and maintenance due him for injuries caused by the unseaworthiness of the vessel and the incompetence of the master, which proceeding resulted in a decree for plaintiff for five hundred ($500) dollars for maintenance and cure.

The admiralty action was brought on behalf of the plaintiff by an attorney of Baltimore, named E. Ridgley Simpson, without the plaintiff's authority, and it appeared that the said E. Ridgley Simpson was the attorney for the defendant, Baltimore Steamship Company. In support of this statement and to furnish this court with the facts of this proceeding in greater detail I annex hereto an

affidavit and notice of motion to set aside this decree upon the ground of fraud. This motion has not come on to be argued, because I can not get the attorneys for the defendants to set a day for hearing before Judge Rose, who is not now in the district court, but who is now a judge of the circuit court of appeals. These motion papers are annexed herewith and marked "Exhibit A."

It will be apparent to the court that the two actions have no similarity. One is an action at law or common-law negligence; the other is an action in admiralty for the unseaworthiness of the vessel. The issues are not the same, nor is the evidence the same. The evidence upon which plaintiff relies to recover in the instant case would not be received in an admiralty court; nor would an admiralty court have jurisdiction of the issues presented in the case at bar. The authorities sustained beyond question plaintiff's contention that the instance case is not res judicata. Inasmuch as under our
13 rule a discussion of authorities is not sanctioned in an affidavit, deponent submits herewith a memorandum of the authorities upon which he relies.

Inasmuch as similar issues have not been tried and similar evidence has not been introduced, the case is not res adjudicata, and the motion is without force.

I annex hereto, copy docket, U. S. District Court, for the District of Maryland, libel, exceptions, and answers of respondent, petition to amend libel, order permitting amendment of libel, final decree, order of satisfaction, opinion of Judge Rose, all in said admiralty case and marked, respectively, "B" to "I," inclusive, and hereby referred to and made a part of this affidavit.

Wherefore, deponent prays that the motion for judgment on the pleadings be denied upon the merits.

EDGAR J. TREACY.

Sworn to before me this 7th day of January, 1924.

WILLIAM F. LATZ,
Commissioner of Deeds, New York City.

14 *Exhibit A—Copy of docket of U. S. District Court for District of Maryland*

Docket No. 900 Admiralty

VERNON L. PHILLIPS, JR., BY VERNON L. PHILLIPS, HIS NEXT FRIEND,

v.

UNITED STATES OF AMERICA, THE UNITED STATES SHIPPING BOARD Emergency Fleet Corporation, and The Baltimore Steamship Company

Daniel O. Hastings, John H. Skeen for plaintiff.
George Forbes for defendant, Amos W. H. Woodcock.
Filings, Proceedings, Clerk's Fees:
Oct. 20, 1921. Libel in a cause of tort, civil and maritime and order of court.

Oct. 20, 1921. Summons issued as to the Baltimore Steamship Company returnable 1st Tuesday in November next, copy writ sent to be served. Summoned the Baltimore Steamship Company, a body corporate, by service on T. E. Carson, the general manager, and copy of writ left with him this 20th day of October, 1921.

45 Oct. 22, 1921. Affidavit of service of copy of libel on U. S. Attorney and mailing copy to U. S. Attorney General, filed.

Nov. 29, 1921. Appearance of Messrs. Daniel O. Hastings and John H. Skeen for the libellant, order filed.

Dec. 29, 1921. Appearance of George Forbes, Esq., for respondent, order filed.

Oct. 9, 1922. Appearance of E. Ridgley Simpson, Esq., for libellant (stricken out), order filed.

Dec. 15, 1922. Exceptions and answer of respondent filed (service admitted).

Dec. 22, 1922. Petition of libellant to amend libel by adding specifications of negligence to the third paragraph and order of court granting leave as prayed, filed.

Feb. 19, 1923. Decree of court in favor of the libellant for $500 for maintenance and cure and that the respondent pay the costs of this proceeding, filed.

Feb. 21, 1923. Opinion of court filed.

Mar. 21, 1923. Decree "Satisfied," "Contented," and "Paid" upon payment of costs by the respondent, order filed.

46 In the United States District Court for the District of Maryland

[Title omitted.]

Exhibit B—Libel and complaint

To the Honorable John C. Rose, judge of said court:

The libel and complaint of Vernon L. Philipps, by Vernon L. Philipps, his father and next friend, against the United States of America, the United States Shipping Board Emergency Fleet Corporation, and the Baltimore Steamship Company, a body corporate in a case of tort, cure, and maritime, alleges as follows:

First. That your libellant is an able seaman and shipped aboard the steamship "West Cape," owned and operated by the United States of America, the United States Shipping Board Emer-

47 gency Fleet Corporation, and the Baltimore Steamship Company, a body corporate, at Baltimore, State of Maryland, for a voyage to England and return, at the rate of wages of $72.50 per month, and that he well and faithfully performed his duties until incapacitated as hereinafter set forth.

Second. That on or about July 24th, 1921, while the said steamship was at sea, your libellant was standing below decks in No. 1

lower hold engaged in cleaning the bilges when a sling load of dunnage then being hoisted started and then suddenly caught, causing the cargo whip to lift one end of a hatch beam from its socket and the other socket failing to hold properly, the said beam dropped, striking your libellant at the left ankle and fracturing it.

Third. He alleges that at the time of his injury he was standing in the place required for the work aforesaid, and that the said beam falling suddenly, he was unable to avoid it before it struck him, and he alleges that his injuries were caused by the negligence of the respondents in failing to provide him with a safe place in which to do the work required of him and in failing to use reasonable care to avoid striking him, and to the unseaworthiness and insufficiency of the gear and tackle employed on board said vessel.

Fourth. That as a direct result of his said injuries gangrene set in and he was forced to suffer the amputation and loss of his left leg above the ankle and below the knee, and has been confined to a hospital ever since said injury, undergoing two operations, and being permanently incapacitated as a result of the loss of his said leg, and he claims therefore fifteen thousand ($15,000) dollars.

48

Fifth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore your libellant prays that summons may issue to the marshal aforesaid commanding him to summon the said respondents, and that they may be required to appear before this honorable court and answer this libel and all and singular matters aforesaid, and that this honorable court may be pleased to decree in favor of your libellants' claim, with costs, and that he may bear such other and further relief as in law and justice he may be entitled to secure.

E. RIDGLEY SIMPSON,
Proctor for Libellant.

49 In the United States District Court for the District of Maryland

[Title Omitted.]

Exhibit C—Petition to amend libel

To the Honorable John C. Rose, judge of said court:

First. The respondents having filed on December 16th, exceptions to the libel on the ground of insufficient specifications of negligence, the libellant prays leave to amend by adding the following specifications of negligence to the third paragraph of this libel.

"Libellant alleges that the negligence claimed consist in the failure of the respondent, the United States of America, to provide a cleat

or socket of the proper design and sufficient strength to sup-
50 port the strongback when one end of it was negligently knocked out of place by a load of dunnage being hoisted from the hold, further the officers of the steamship 'West Cape' were incompetent; further that the respondents owe a special duty, Vernon L. Philipps, jr., because of his youth and inexperience, and libellant claims that in the event that negligence is not established for wages, maintenance and cure."

Wherefore, libellant prays leave to amend as above set forth.

DANIEL O. HASTINGS,
JOHN H. SKEEN,
Proctors for Libellant.

Verified December 22nd, 1922, by J. H. Skeen, Proctor for Vernon L. Philipps, jr., before Chas. M. Zimmerman, Chief Deputy, Clerk, U. S. District Court.

Exhibit D—Order

On the foregoing petition and affidavit it is, by the court, this 22nd day of December, 1922, ordered that the libellant have leave to amend as prayed.

J. H. ROSE,
U. S. District Judge.

Endorsed: Filed, December 22nd, 1922. Mr. Clerk: Please file. John H. Skeen, proctor for libellant.

51 In the District Court of the United States for the District of Maryland

[Title omitted.]

Exhibit E—Final Decree

This cause having come on for hearing on the pleadings and proofs, and having been argued and submitted, due consideration having been had, it is now this 19th day of February, 1923,

Ordered, adjudged and decreed by the District Court of the United States for the District of Maryland, that the respondents are not liable to the libellant for full indemnity but only for maintenance and cure which is duly fixed at five hundred dollars and which the respondents are to pay to the libellant.

And it is further ordered, adjudged and decreed that the respondents pay the costs of this proceeding.

J. H. ROSE,
U. S. District Judge.

52 **In the District Court of the United States for the District of Maryland**

[Title omitted.]

Exhibit F—Order of satisfaction

ARTHUR L. SPAMER, Esq.,
Clerk.

SIR: Enter the decree in the above entitled case fully "satisfied" "contented" and "Paid" upon payment of costs by the respondent.

DANIEL O. HASTINGS,
JOHN A. SKEEN,
Proctors for Libellant.

Endorsed: Mr. Clerk: Please file. Amos W. W. Woodcock, U. S. Attorney, by George Forbes, of consul, proctor for respondents. Filed March 21, 1922.

53 United States District Court, District of Maryland

[Title omitted.]

Exhibit A, in Opposition to Motion

Upon the annexed affidavit of Vernon L. Philipps, Jr., duly verified the 21 day of May, 1923, and upon the pleadings and proceedings had herein, let the defendants or their attorneys show cause on or before the 15th day of June, 1923, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why the decree herein, filed February 19th, 1923, and the order and satisfaction herein filed March 21st, 1923, should not be set aside and vacated; and why the plaintiff should not have such other and further relief as may be just, provided.

Service of this order by serving the attorneys for the defendants with a copy thereof and annexed affidavit on or before the 8th day of June, 1923, shall be deemed good and sufficient service.

Dated, Baltimore, June 4, 1923.

MORRIS A. LOPES,
U. S. District Judge.

54 United States District Court, District of Maryland

[Title omitted.]

Exhibit A

CITY OF SMYRNA,
County of Kent, State of Delaware, ss:

Vernon L. Philipps being duly sworn, deposes and says: I was the libellant in the above entitled action. I am a resident of Smyrna, Delaware, and I am now twenty (20) years old. In the Spring of 1921, I shipped out of Baltimore on the steamship "West Cape," a

merchant vessel, owned and operated by the above defendants. I was put down on the articles as an able-seaman, although I had never been to sea before. The ship went to England, and on its return voyage, about four days from home, I met with an injury as a result of which my leg had to be amputated above the knee.

My injury was caused by the gross negligence of the seamen
55 and subordinate officers of the ship. On July 24th, 1921, while the ship was under way and when a considerable sea was running, certain of the crew were ordered to take some dunnage out of the hold. I was at work in the hold but I was not engaged in this particular work. It appears that a most negligent method of work was employed. Only a part of the hatch covering was removed, and instead of having the dunnage placed directly under the opening, the line was run into the hold and fastened to the dunnage under the deck and the dunnage was hauled out by a winch. When the winch was started the dunnage or whip caught under the strong back of the hatch and displaced it, throwing it into the hold upon me. My injuries were very serious and I was treated on board the ship and in the Marine Hospital at Norfolk, Virginia, where my leg was amputated.

In October, 1921, without any knowledge on my part, the libel was filed by one E. Ridgely Simpson, an attorney of Baltimore, Maryland. I do not know this attorney and I did not employ him, and I have subsequently ascertained that he was and is the attorney for the defendant, Baltimore Steamship Company, and that he commenced this action upon the instigation of William A. Stayton, the president of the Baltimore Steamship Company, one of the defendants. In support of this statement, I annex hereto and make a part of this affidavit, a letter from Mr. Simpson, dated October 5th, 1922, (Exhibit A), and a letter from Mr. Simpson, dated October 9th, 1922, (Exhibit B), and a letter from Mr. Stayton dated November 14th, 1921, (Exhibit C). It appears, therefore, without possibility of contradiction, that the attorney for one of the defendants
56 undertook to prosecute an action in my behalf, and this fact is established beyond question, by the written admissions of this attorney, and of his principal, the president of the defendant corporation.

Subsequently, and after the suit had been started and after Mr. Simpson had been acting for me without any authority for over a year he caused his appearance to be stricken from the record (Exhibit D). During this period, one Daniel O. Hastings, an attorney of Wilmington, Delaware, and John Henry Skeen, an attorney of Baltimore, Maryland, came to represent me. Three attorneys, Messrs. Simpson, Hastings, and Skeen, have acted throughout in collaboration. These lawyers did not act for my interests, but rather acted in the interests of the defendants. This statement is proven by the following facts:

(a) It is undisputable that Mr. Simpson was and is the attorney for the defendant, Baltimore Steamship Company. This attorney,

without any authority from me or from my family, started an action in admiralty against the defendants above named. I have had no action in admiralty, other than a claim for maintenance and cure, but I have a perfect cause of action at common law, for indemnity for the loss of my leg, under the Merchant Marine Act.

(b) The attorneys, Hastings and Skeen, acted throughout the case in furtherance of the scheme originally set on foot by the attorney Simpson. This is evident from their correspondence and it is further evident from their conduct of the case. It is apparent, and it must have been apparent to them, that I had no cause of action in admiralty. Had they been acting in my interest, the proper course for them to have pursued, would have been to discontinue the libel, and commence an action at common law under the merchant marine act. It cannot be supposed that these attorneys did not knew the law. In fact, Mr. Skeen, realizing that his conduct was open to criticism in this regard, attempted to defendant his course by asserting in a letter that he knew about the merchant marine act, but that he considered it unconstitutional. In other words, this attorney with full knowledge that he was wilfully refused to avail himself of a perfect remedy in my behalf, seeks to excuse his misconduct by the gratuitious and unsupported statement that he believes this law to be unconstitutional (see letter of Mr. Skeens', Exhibit E), and he makes this bold excuse in the face of the fact that the merchant marine act has been consistently followed and upheld in a multitude of cases similar to mine in the State and the Federal court. I annex hereto and make a part of this affidavit, a letter dated March 24th, 1922 (Exhibit E), written by Mr. Skeen, wherein it appears that he wilfully refused to pursue my remedy under the merchant marine act, alleging as an excuse that the act was unconstitutional.

(c) During the entire litigation pressure was continually brought to bear on me by these attorneys to induce me to settle and compromise my claim against the defendants for a comparatively small amount of money: and this I have consistently refused to do.

The action came on to be tried and resulted in a decree for maintenance and cure for five hundred ($500) dollars. I never received a cent of this money, but Mr. Skeen, without any authority whatsoever, collected the money and satisfied the judgment.

I was not even notified of the decision in my case until after the judgment was satisfied. A final decree was filed February 19th, 1923, and the satisfaction was filed March 21st, 1923, as appears by the docket of this Court, and on March 23rd, 1923, for the first time I was notified of the decision in my case (see letter of Mr. Hastings, Exhibit G). By this time over a month had passed since the entry of the decree and it was then too late for me either to appeal from the decree or to move to set the decree aside.

From the conduct of my affairs by these attorneys I am convinced that these attorneys conspired to defeat me and fraudulently

acted under the guise of representing my interest, but in fact acted for the interest of the defendants. This statement is verified by the written admissions of these attorneys and the correspondence which I have annexed to this affidavit.

I now ask the Court in the interest of justice to set this decree aside upon the ground that it was fraudulently obtained. No previous or other application for this or similar relief has ever been made and I therefore ask for an order to show cause why the decree in this action filed February 19th, 1923, and also the order and satisfaction in this action filed March 21st, 1923, should not be vacated and set aside.

Sworn to before me this 21st day of May, 1923.

JOHN GRIFFIN,
Notary Public.

59 *Exhibit "A"*

Phones: St. Paul 910; St. Paul 2512.
Cable address, "Simlaw."
E. Ridgely Simpson, attorney at law and proctor in admiralty, 1003–5 American Building, Baltimore, Md.

OCTOBER 5TH, 1922.

VERNON L. PHILLIPS, Esq.,
Smyrna, Delaware.

DEAR SIR: In reference to your claim against the Shipping Board for injuries sustained by you last year on the "West Cape," wish to say that on account of the interest which was felt by Captain Wm. H. Stayton, president of the Baltimore Steamship Company, in your case, I was retained by the Baltimore Steamship Company at its expense and without any expense whatsoever to you to see that fair play was done in this matter and that a proper allowance of compensation be made to you for your injury. The Baltimore Steamship Company as a company is in no way connected with this matter and it was purely through a sense of loyalty on Captain Stayton's part that I was called in, and I filed the original libel in the Federal court here upon which your recovery depends. As you know since that time the
60 case has been turned over to Judge Hastings of Wilmington, whose correspondent down here is Mr. John H. Skeen, and I have been doing my best to cooperate in every way in assisting Mr. Skeen in this matter.

I have just returned from my vacation and hear that during my absence Mr. Skeen was able to secure an offer of compromise from the insurance people to settle your case for $4,000 and I am writing to say that we all feel that this will be an extremely satisfactory settlement. In my own opinion there is a good deal of doubt under the law as to whether or not you will have a legal right of recovery at all, and there is a second difficulty of obtaining proper evidence to support your claim due to the fact that the ship has long been out of commission and your shipments are scattered around the country.

I also believe that even were these two obstacles overcome you would not secure a verdict of over $2,500 or $3,000 at the outside in court and for all these reasons wish to urge as strongly as possible for your own interest that you will accept this compromise.

I may say in this connection that Captain Stayton feels exactly as I do in this matter and has instructed me that in the event this compromise is not satisfactory to you, I withdraw my appearance from the case, which, of course, I will have to do, as he feels that the Steamship Company has done all that could possibly be done in assisting you in this matter.

I should be glad to have a reply from you as to whether or not you may see fit to accept this compromise, realizing that it is for your own best interest and am forwarding a copy of this letter to Mr. Skeen, your attorney here in Baltimore.

Very truly yours,

E. RIDGELY SIMPSON.

61 *Exhibit "B"*

Phones: St. Paul 0910; Plaza 2512.
Cable address, "Simlaw."
E. Ridgely Simpson, attorney at law and proctor in admiralty, 1003–4 American Building, Baltimore, Md.

OCTOBER 9TH, 1922.

VERNON L. PHILLIPS, Esq.,
Smyrna, Delaware.

DEAR MR. PHILLIPS: I have your letter of October 6th in reference to your son's case and I am writing to say that I am to-day striking out my appearance in this proceeding and have so written your Baltimore attorney, Mr. Skeen, copy of my letter to him being enclosed.

Very truly yours,

E. RIDGELY SIMPSON.

62 *Exhibit "C"*

William H. Stayton, president.
A. J. Townsend, vice president.
Rear Admiral Hugo Osterhaus, U. S. N., chairman executive committee.
Baltimore Steamship Company, Inc., Lexington Building, Baltimore, Md.

NOVEMBER 14, 1921.

VERNON L. PHILLIPS, Esq.,
Smyrna, Del.

DEAR MR. PHILLIPS: I have your letter of the 11th and it does not seem useful to go into the matter any further, for from the beginning you have misunderstood the situation and I cannot get you to understand it.

Of course, if your son had a suit against the Baltimore Steamship Company it would be very improper and wrong for me to suggest that the company's lawyer should act for your son in a case against his own company. Indeed that would be dishonest and it never occurred to me that any one could suppose that that was the present situation.

You are wholly mistaken in supposing that your son's law-
63 yers are going to sue the Baltimore Steamship Company. I think if you will put the matter before Judge Hastings, or before Mr. Skeen, who is Judge Hastings' lawyer here in Baltimore, you will find that you have been entirely mistaken in this matter. Your son's suit is against somebody else entirely and the Baltimore Steamship Company has no liability in the matter.

My interest was merely because I came from Smyrna and I wanted to see that your boy had every possibility of getting what was due him. In short I did just what you suggested. I tried to do for your own boy exactly as I would want you or somebody else to do for one of my boys under similar circumstances.

The Baltimore Steamship Company then has no financial liability in the matter, but we know the people who were aboard the ship and we could get the testimony for your son and I feel that we could help him out in establishing his case. I did not want to have him put to any expense in the matter, and I, therefore, asked Mr. Simpson to help out in the matter, at the expense of this company.

In spite of the unfriendly tone of your letter (I do not feel that your son should be held responsible for that), I am still ready to do for him anything that I can and I have asked Mr. Simpson to continue to be ready to help the boy out in every possible way and to cooperate with Judge Hastings, or Mr. Skeen to the fullest extent.

Very truly yours,

WHS: EC W. H. Stayton.

64 *Exhibit "D"*

October 9th, 1922.

John H. Skeen, Esq.,
Equitable Building, Baltimore, Md.

Dear Mr. Skeen: Enclosed please find copy of a letter received to-day from Mr. Phillips.

I do not believe that I can do anything further in the matter, as Captain Stayton feels that the boy has been given a square deal and has instructed me to discontinue further services at the steamship company's expense. I am accordingly striking out my appearance in the case to-day.

Very sincerely.

P. S.—If I can cooperate, however, in any way, please do not hesitate to call on me.

E. R. S.

65 *Exhibit "E"*

Eli Frank, C. John Beeuwkes, John Henry Skeen.
Cable addresses: "Fremobe," "Admiralty."
Reuben Oppenheimer.
Law offices Frank, Emory & Beeuwkes, Equitable Building, Baltimore.

MARCH 24TH, 1922.

DANIEL O. HASTINGS, Esq.,
Industrial Trust Bldg., Wilmington, Del.

In re Phillips v. "West Cape."

DEAR MR. HASTINGS: I have your letter of March 20th in which you asked me to express my views on the proposed settlement of $3,000.00.

I may say at the outset that I have given very careful consideration to this case on account of the serious injuries involved, and feel a great responsibility to your client on that account. The law, however, as you know, is unfortunately unfavorable to a large award in a case of this kind. Briefly, I believe the settled law to be that a seaman injured in the services of the ship is entitled to recover wages, maintenance, and cure without the necessity of proving any negli-
66 gence whatever. The measure of damages in such a case, however, is merely any unpaid wages due at the end of the voyage, plus the expense of subsistence of the seaman, medical attention, and expenses connected therewith. Ordinarily, this obligation does not extend beyond the end of the voyage, although in some cases it has been extended to a reasonable time thereafter. In such a case the court can not consider the permanent disability of the injured man.

In this case, while I have not seen the figures, it is hardly possible that all of the expenses of this sort which Mr. Phillips has paid or incurred to date in connection with his son's injuries would amount to $3,000.00.

On the other hand, if negligence can be proven, full damages may be recovered. The negligence, however, must be that of the owners of the vessel as evidenced in a failure to provide and maintain proper structures and appliances, but does not mean the negligence of the officers and crew, for which, in the admiralty, the owner is not responsible.

In this case, according to my information from the master of the vessel, the fault was in the failure to remove a steel hatch beam and in carelessly handling the unloading of dunnage, whereby one end of the beam was pulled out of its socket and it fell into the hold and injured young Phillips. The fault is obviously that of the master and crew and not of the owner. Unless we could show some structural defect in the design or manufacture of the beam and its supports, which seems to me to be hardly possible, I have therefore little hopes of being able to show negligence of the owner.

67 It is, therefore, my conscientious judgment that Mr. Phillips should accept the offer made, as I very much feel that even without best efforts and assuming a success which I do not think we can obtain, he would not, in the end, be any better off.

It may be well to make it a matter of record that consideration has been given to section 20 of the act of June 5th, 1920, the merchant marine act, which provides "That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply."

I have not been able to find any construction of this act and it is significant that although it has been in force for almost two years no suits have been brought thereunder. I can not see that it gives us any substantial help in this case. An examination of the Federal employers' liability act as applied to railroad employees, shows that section 3 of that act (see 8 Fed. Statutes Annotated, p. 1264) has been held to abrogate the defense of fellow servant as far as that act is concerned. We have already, however, the benefit of such a provision for what it is worth in section 20 of the seamen's act of March 4th, 1915, provides that the seamen having command shall not be held to be fellow servants with those under their authority which was construed in the Chelentis case, 62 L. ed. page 1171, to the effect that such provision did not change the admiralty measure of damages. I do not see anything else in the Federal employee's liability act as
68 applied to our case which does us any good and personally, I do not feel that we should experiment with client's rights by bringing suit under the provisions of the merchant marine act referred to.

Yours very truly,

JOHN SKEEN.

JHS/H

Exhibit "F"

Law offices, Industrial Trust Building, Wilmington, Del.
Daniel O. Hastings, Ayres J. Stockly, Clarence A. Southerland.
Telephone 4940

APRIL 3RD, 1922.

Mr. VERNON PHILLIPS,
Smyrna, Delaware.

DEAR SIR: After a careful investigation, I am quite certain that you ought to have accepted the $3,000 that was offered. When I last saw you I felt like letting you have your own way about it, but after thinking it over, it seemed to me that I ought to insist on you accepting it.

I took it up with Mr. Skeen and asked him to write me his views about it, and I enclose you herewith his letter.

I think you had better reconsider this matter.
69 I shall be glad to talk it over with Mrs. Phillips if that be necessary.

Very truly yours,

CEnc. DANIEL O. HASTINGS.

Exhibit "G"

Law offices, Industrial Trust Building, Wilmington, Del.
Daniel A. Hastings, Ayres J. Stockly, Clarence A. Southerland.
Telephone 4940.

MARCH 23RD, 1923.

Mr. VERNON L. PHILLIPS,
Smyrna, Delaware.

MY DEAR MR. PHILLIPS: I hand you herewith copy of the court's opinion in your case. The final amount he decided on was $500.

Very truly yours,

DANIEL O. HASTINGS.

CEnc.

70 That thereafter, on January 15, 1924, the said Judge rendered a decision granting said motion for judgment on the pleadings, as follows:

In United States District Court, Eastern New York

[Title omitted.]

Opinion on motion for judgment

INCH, J. This is a motion for judgment on the pleadings pursuant to a stipulation signed by the attorneys for all parties and duly filed herein.

The motion is made by the defendants, and is based by them upon the plea of res judicata set up in defendants answers.

On October 20, 1921, this plaintiff, began an action in Admiralty against the above defendants, in the United States District Court, for the District of Maryland. Plaintiff sought therein in-
71 demnity for personal injuries sustained while he was an able seaman on board the steamship "West Cape," operated by the defendants.

In substance the complaint stated that he was working below decks when a sling load of dunnage fell upon him and caused his injury. That his injuries were caused by the negligence of the defendants in failing to provide him with a safe place in which to work, in failing to use reasonable care to avoid striking him, and to the unseaworthiness and insufficiency of the appliances of the vessel.

This action came on for trial on the 21st day of December, 1922, and on February 19, 1923, the court rendered its decision, and a decree was entered finding that the defendants were not liable to plaintiff for indemnity, but only for maintenance and cure, which was fixed at $500.00.

On March 21, 1923, this sum of $500.00 was paid and said decree fully satisfied.

Notwithstanding the above the plaintiff, two months later and on the 22nd day of May, 1923, commenced this present action against

these defendants in the Supreme Court, Nassau County, State of New York.

This State court action was duly removed by defendants into this court and defendants have answered and now make this motion.

An examination of the complaint in the State court and now at issue here discloses substantially the same allegations of fact as to how the accident happened as in the Admiralty action.

The complaint here alleges in paragraph "twelve" that the injuries to plaintiff were directly caused by the negligence of the defendants, and of the officers and their seamen in their employ, in their negligent and reckless control, in the operation of said
72 vessel and of said winch and appliances on the said vessel and in their operation thereof, in their disregard of the rights, presence, and safety of the plaintiff and in their failure to give warning to plaintiff of the impending danger.

In the action in Admiralty plaintiff claimed $15,000.00. In the present action plaintiff claims $100,000.00.

It would seem that plaintiff, having had a fair trial in the United States Court, District of Maryland, that this would be all that he was entitled to. However, plaintiff contends that the action in the Admiralty court was tried simply on the allegations that the vessel was unseaworthy and other grounds alone recognized by courts of Admiralty and does not therefore bar a suit at common law based on negligence, where section 20 of the merchant marine act is available to seaman, such as plaintiff was. That therefore while the parties are the same, the issues are different.

The cases cited by the plaintiff do not seem to me to be in point.

It is plain from a reading of the papers both in the Admiralty action and in this present action that the same facts are relied upon to show liability to plaintiff on the part of these defendants. The cause of action in both actions is to recover for personal injuries due to neglect of duty by defendants. The word "indemnity" has no significance so far as the point now under consideration is concerned.

Accordingly when the plaintiff commenced his first action against defendants on October 20, 1921, entirely aside from the merchant marine act, he had a right to sue the defendants either in Admiralty or common law.

73 If he sued in Admiralty he would not be entitled to recover an indemnity for the negligence of the master of any other member of the crew and all the members of the crew exclusive possibly of the master were between themselves fellow servants.

This would not of course have affected his right to recover, as he did for maintenance and cure.

The same rule as to fellow servants would have existed in his common law action.

Plaintiff would therefore have been no better off so far as his present contention is concerned in either action.

The "Osceola, 189 U. S. 158; Panama R. R. *v.* Johnson, 289 Fed. Rep. 964."

The common law rule is concisely stated:

"The decided weight of authority is to the effect that all who serve the same master, work under the same control or deriving authority and compensation from the same source and are engaged in the same general business, although it may be in different grades or departments of it, are fellow servants, each taking the risk of the others negligence."

26 Cyc., page 1282.

"Those entering into the service of a common master become thereby engaged in a common service and are fellow servants."

Northern Pac. R. R. v. Peterson, 162, U. S. 346.

Accordingly, there was no better opportunity offered to
74 a seaman seeking to recover for personal injuries at common law than in Admiralty, and a trial having been had in either one, on the same facts and between the same parties, and a decree or judgment having been entered, the same ended the matter.

In March, 1915, the common law rule as to fellow servants was limited to a certain extent for seaman, where it was held that seaman having command shall not be held to be fellow servants with those under their authority.

38 Stat. L. 1185; 9 Fed. Stat. Ann. (2nd. Ed.) 180.

This possibly did not increase plaintiff's chances.

In June 1920, however, the above section 20 was amended to read as follows:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply, etc."

41 Stat. L. 1007; Fed. Stat. Ann. (supplement, 1920).

Prior to this last amendment, as I have pointed out the common law or the Admiralty Court rules as to fellow servants were practically the same, and there was no reason to fear two suits from the same plaintiff against the same defendants for the same cause of action; but upon the enactment of the amendment of June
75 5, 1920, it became apparent that it might be argued, as it now is, in this case, that the law in the two courts were so different as not to make the judgment of one res judicata as to the other.

It seems to me, that it was to prevent just such construction that the said statute for the first time contains the otherwise meaningless words. "At his election." In other words, while Congress greatly limited the common law rule, it confined same to common law actions, and gave the plaintiff the opportunity to then choose into which court he would go.

An election or choice deliberately made is final and I find nothing in said statute or elsewhere that actually or impliedly authorizes two

suits for the same cause of action on the same facts and between the same parties.

For over a year prior to the commencement by plaintiff of his suit to recover for personal injury said statute had been available to him.

He elected to sue in the Admiralty Court, he had a fair trial and a decree was entered and satisfied.

By reason of his election and the entry of the decree in the court of his choice he was barred from commencing his present action in the other or common law court.

Motion granted.

R. A. INCH,
U. S. D. J.

That thereafter, on the 25th day of February, 1924, an order directing judgment dismissing the complaint was granted, as follows:

76 In United States District Court, Eastern New York

[Title omitted.]

Order granting order directing judgment dismissing complaint

Feb. 25, 1924

The defendants having made a motion herein for an order directing judgment dismissing the complaint herein on the grounds that there is an existing final judgment on a decree of a court of competent jurisdiction rendered on the merits determining the same cause of action between the parties, and for such other relief as may seem just and proper and said motion having come on to be heard before me on the 9th day of January, 1924.

77 Now, upon the pleadings and proceedings heretofore had, and after having heard Joseph M. Dreyer, of counsel for the defendants, in support of said motion, and Edgar J. Treacy, attorney for plaintiff, in opposition, and upon filing the memorandum of the court, it is

Ordered, that the said motion be, and the same is hereby, granted in all respects.

R. A. INCH,
U. S. D. J.

In United States District Court, Eastern New York

Writ of error

That thereafter, on March 17, 1924, the plaintiff obtained a writ of error to the United States Circuit Court of Appeals for the Second Circuit, which was duly filed in the office of the clerk of the District Court of the United States for the Eastern District of New York on March 17, 1924, as follows:

"UNITED STATES OF AMERICA, *ss:*

"The President of the United States of America, to the judges of the District Court of the United States for the Eastern District of New York, greeting:

"Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court,
78 before you, or some of you, between Vernon Philipps, an infant, by Vernon Philipps, his guardian ad litem, plaintiff, against Baltimore Steamship Company and United States Shipping Board Emergency Fleet Corporation, defendants.

"A manifest error hath happened, to the great damage of the said Vernon Philipps, and infant, by Vernon Philipps, his guardian ad litem, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in his behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States Circuit Court of Appeals for the Second Circuit, at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 15th day of April, 1924, that the record and proceedings aforesaid being inspected, the said judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

"Witness the Honorable William H. Taft, Chief Justice of
79 the United States, this 17th day of March, in the year of our Lord one thousand nine hundred and twenty-four, and of the independence of the United States the one hundred and forty-eight.

"PERCY G. B. GILKES,

"*Clerk of the District Court of the United States of America, for the Eastern District of New York, in the Second Circuit.*

"The foregoing writ is hereby allowed.

"March 17, 1924.

"ROBERT A. INCH,

"*U. S. District Judge.*"

80 In United States District Court for the Eastern District of New York

[Title omitted.]

Order to show cause

April 21, 1924.

On reading and filing the annexed affidavit of Edgar J. Treacy, verified the 21st day of April, 1924, and on the pleadings and proceedings had herein, let the defendants show cause before me at the chambers of the United States District Court for the Eastern District of New York at the United States Post Office Building at the Borough of Brooklyn, City of New York, on the 23rd day of April, 1924, at 10 o'clock in the forenoon of that day or as soon

thereafter as counsel can be heard, why the motion to dismiss the complaint herein upon the ground that the action is res adjudicata, should not be reargued on the ground that the decision of the United States Supreme Court in the case of Panama Railroad v.
81 Johnson, 289 Fed. 964, was not before the District Court when the motion was decided, and that this decision would have required that the motion be denied; and if a reargument thereof be granted, why it should not then and there proceed.

Service thereof and of the annexed affidavits if made on or before five o'clock in the afternoon of the 21st day of April, 1924, shall be sufficient.

R. A. INCH,
United States District Judge.

In United States District Court for the Eastern District of New York

[Title omitted.]

Affidavit of Edgar J. Treacy

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

Edgar J. Treacy, being duly sworn, deposes and says: I
82 am the attorney for the plaintiff in this action, and I am acquainted with all the facts and proceedings in this litigation. The action was brought in the Supreme Court of the State of New York, in the County of Nassau, to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendants as an able-bodied seaman on the steamship "West Cape" on July 24, 1921. Prior to the commencement of this action a libel was brought against the defendants in the United States District Court for the District of Maryland, in rem for maintenance and cure which resulted in a decree against the respondents for maintenance and cure in the sum of five hundred ($500) dollars on February 19, 1923.

The action for damages for personal injuries was commenced by the service of a summons and complaint on May 22, 1923, and was removed to the United States District Court by the defendant, and after the joinder of issue the defendant made a motion for summary judgment upon the ground that the action was res adjudicata. This motion came on to be heard upon stipulation before the Honorable Robert A. Inch, district judge, and on February 25th, 1924, an order was duly made and entered dismissing the complaint herein on the ground that there is an existing final judgment determining the same cause of action between the parties.

Since the hearing and determination of this motion and since the entry of the order referred to the Supreme Court of the United States has rendered its decision affirming the judgment in the case of Panama Railroad v. Johnson, 289 Fed. 964. In the light
83 of this decision it would appear that the decree on the libel above referred to was only decisive on the questions of maintenance and cure; and that inasmuch as the questions of maintenance and cure were the sole questions litigated in the prior action or

proceeding, the aforesaid decree can not be decisive of the present action which is for damages for personal injuries caused by the negligence of the crew of the vessel. In the interest of justice therefor, deponent prays for a reargument of the aforesaid motion and inasmuch as the matter may be brought up more speedily by order be granted to show cause, deponent respectfully requests that an order directing the defendants to show cause why the aforesaid motion should not be denied; and for a reargument of the aforesaid motion; and for such other and further relief as to the court may seem just.

Except as above stated, no previous or other application for the relief herein has been made.

EDGAR J. TREACY.

Sworn to before me this 21st day of April, 1924.

WILLIAM F. LATZ,
Commissioner of Deeds.

New York County Clerk's No. 263. New York County Register's No. 25123. Kings County Clerk's No. 130. Kings County Register's No. 5107. My term expires Oct. 3d, 1925.

That thereafter, on the 28th day of April, 1924, the said order to show cause came on to be heard before the said judge, and the
84 defendants through its counsel, Joseph M. Dreyer, filed the following affidavit in opposition to the motion of plaintiff for a reargument of said motion to dismiss the complaint herein, on the ground that the court was without jurisdiction.

In United States District Court, Eastern District of New York

[Title omitted.]

Affidavit of Joseph M. Dreyer

STATE OF NEW YORK,
County of New York, ss:

Joseph M. Dreyer, being duly sworn, deposes and says:

That he is an attorney and counsellor at law associated with the office of Nathan A. Smyth, of counsel for the defendants
85 herein and appeared as counsel for the defendants in support of a motion for an order directing judgment dismissing the complaint herein on the ground that there is an existing final judgment or a decree of a court of competent jurisdiction rendered on the merits determining the same cause of action between the parties, and for such other relief as might seem just and proper, which said motion came on to be heard before Honorable Robert A. Inch, district judge of said court.

That on the 25th day of February, 1924, the said motion was granted; and an order was signed by Hon. Robert A. Inch, United States District Judge, granting said motion.

That on March 17, 1924, plaintiff, through his attorney, filed a petition for writ of error in his behalf to the United States Circuit

Court of Appeals for the Second Circuit and on the same date the writ of error was allowed and filed with the clerk of the United States District Court for the Eastern District of New York; that on the same day, March 17, 1924, plaintiff, through his said attorney, filed his assignment of errors in the office of the clerk of the United States District Court for the Eastern District of New York; that on the 18th day of April, 1924, plaintiff filed in the office of the clerk of the United States Court for the Eastern District of New York, a transcript of record for the purpose of having same certified to the United States Circuit Court of Appeals for the Second Circuit, in compliance with said writ of error.

That the plaintiff having obtained a writ of error directed to the Judges of the District Court of the United States for the Eastern District of New York commanding that the record and proceedings in this case be sent to the Judges of the United States
86 Circuit Court of Appeals for the Second Circuit on the 15th day of April, 1924, and said writ of error, together with plaintiff's assignment of errors, having been filed with the Clerk of the United States District Court for the Eastern District of New York, this court is without jurisdiction to hear and consider any reargument of the said motion to dismiss the complaint, and upon which motion the said order dismissing said complaint was granted on Feb. 25, 1924.

Wherefore, deponent prays that the motion of plaintiff for a reargument of the said motion to dismiss the complaint be denied and for such other and further relief as to the court may seem just and proper.

Subscribed and sworn to before me this 28th day of April, 1924.

That thereafter, the said judge requested the United States Circuit Court of Appeals for the Second Circuit to return the writ of error and the record and proceedings in this cause to the United States District Court for the Eastern District of New York, as follows:

87 In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Order directing return of writ of error and record

This cause having been brought to the United States Circuit Court of Appeals for the Second Circuit on writ of error to the Judges of the District Court of the United States for the Eastern District of New York, dated March 17, 1924, the said writ of error being in

ffect an appeal from an order granting a motion made by the defendant below for judgment on the pleadings, and it appearing to me that the interests of justice require a reargument of the said motion, I therefore respectfully request this honorable court to return the said writ and the record and proceedings in this
88 cause to the United States District Court for The Eastern District of New York.

R. A. INCH,
United States District Judge.

So ordered.
C. M. H.
M. T. M.
J. M. M.
A true copy, WM. PARKIN, *Clerk.*

That thereafter, on May 15, 1924, said judge rendered the following opinion.

In United States District Court, Eastern District of New York

[Title omitted.]

Opinion, May 15, 1924

INCH, J.: Since the service of these motion papers the appeal from the order under consideration has been withdrawn
89 and the appeal papers on ex parte application duly returned to this court so that it now has jurisdiction to consider the motion. Such jurisdiction had been lost due to the filing of said appeal.

Morrin *v.* Lawler, 91 Fed. 693; McKay *v.* Neussler, 148 Fed. 86.

This is a motion by plaintiff for reargument of a motion previously made by defendants on the pleadings, which has resulted in an order dated February 25, 1924, dismissing the complaint herein on the groud that a previous decree between the same parties, in the United States District Court of Maryland, sitting as a court of admiralty, by reason of an election by plaintiff, pursuant to this court's construction of a certain statute, was a bar to litigation by plaintiff of the issues now sought to be litigated by him in this common law action.

This motion is based on the fact that the Supreme Court of the United States has now construed the said statute in a decision handed down on or about April 7, 1924, which decision was not before this court at the time it granted defendant's motion and is deemed sufficient to justify a different decision by this court.

I have given this motion most careful consideration.

If this plaintiff has a meritorious cause of action for personal injuries and by reason solely of a construction by this court of the said statute has had the door of the court closed upon him and yet when the final construction of that statute has been later declared by

the Supreme Court to be one that not only would have opened
90 the door to him in the Maryland court but should have done so here this plaintiff must still go away unsatisfied, it would indicate a situation that justifies a careful consideration of the matter lest the doing of justice, which is the principal reason for the existence of courts, be made secondary to mere procedure of pride of opinion.

Courts can not exist without procedure or rules of evidence and a procedure that is not uniform or that is lightly changed in this or that case and a failure to adhere to established rules of evidence would soon end in no procedure and in great injustice to litigants. While the plaintiff has rights, the rights of a defendant are of equal importance. Justice means a square deal to both parties.

One of the essential rules of law for the peace and orderliness of society is that an action between the same parties and for the same cause which results in a judgment or decree must be considered as terminated by such judgment or decree for all time thereafter and in all other courts so far as the issues litigated or which could have been litigated therein are concerned.

Campbell *v.* Rankin, 99 U. S. 261.

Mistakes of counsel or even the fortunately rare cases of bad faith between attorney and client can not change this rule. The law assumes that different and adequate remedies exist for such client without the necessity of withdrawing from countless others who must come into court the protection of this salutary and fair rule, of a day in court and but one trial.

It is important, therefore, to examine and see if this plain-
91 tiff is in such a position that regardless of the question of construction of the said statute he nevertheless can not have a trial of his action for personal injuries, which he plainly has not yet had without coming in conflict with this more important rule of justice to the many, including the defendant, known as the rule of res judicata.

Without in any way indicating an opinion as to the merits it would seem from the opinion of the learned judge who presided at the admiralty trial and from the statements in the various papers on the motions that have come before me, that plaintiff is a young man and has been seriously and permanently injured without fault on his part and by the carelessness of those who controlled and worked with him on a ship.

Plaintiff seeks redress. Justice demands that he have his day in court. If he is right he ought to receive compensation from those responsible. If he is wrong he will have to pay the costs.

It certainly is not an injustice to defendant to allow him his day in court on this claim if he has not had it. The question therefore is, has plaintiff had that day in court in which to try out his claim that he has been injured by negligence of the master or the crew?

The first obstacle is as to the question of the construction of the statute.

I am inclined to believe that the very learned trial judge, whose decisions are considered high authority on Federal procedure, entertained, although he did not express it, the same view as that expressed afterward by me in regard to the construction of section 20 of the act of March 4, 1915, C. 153, 38 Stat. 1185, as amended by section 33 of the act of June 5, 1920, C. 250, 41 Stat. 1007, which reads as follows:

Section 20. "That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; * * *"

In other words that plaintiff had the right to elect between a suit in admiralty with its limitations and a suit at law with the advantages of the amendment.

It seemed to me that plaintiff had made his election and was bound by it. The time to appeal from the decree in the District Court of Maryland was allowed to pass by plaintiff's former attorneys and has long since expired and the decree entered, for maintenance and cure only, in the nominal sum of $500.00, was satisfied by them.

The case in which the final construction of said statute was rendered was a common law action and arose in this district, Panama R. Co. *v.* Johnson, 290 Fed. 964, where the judgmet in the court below was affirmed on appeal by the Circuit Court of Appeals, 2nd Circuit, in a very learned opinion by Judge Rogers. This decision of the Circuit Court of Appeals was duly affirmed in a decision, not yet reported, handed down on or about April 7, 1924, by the Supreme Court of the United States.

The constitutionality of this said section, as amended, in a common law action, was the main point involved. The Circuit Court of Appeals held it constitutional, the opinion saying, at page 971, "We see no reason to doubt that Congress possesses the power to declare that shipowners shall be subject to the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect to their employees on shore and it may specifically provide that statutes applying to personal injury actions of railway employees shall apply to similar actions by seaman," and also at page 974 "It thus appears that under the maritime law a seaman was not allowed to recover anything more than his maintenance and cure and wages for injuries resulting from accident or negligence of the master or member of the crew; but that he might recover an indemnity for injuries due to the unseaworthiness of the ship or resulting from a failure to supply and keep in order the proper appliances appurtenant to the ship."

Thus while the above reasoning lends itself to the decision as to the construction of the statute afterwards stated by the Supreme Court as to the election therein mentioned, nevertheless, so far as I can see, such construction was not there expressed and it was not

until this decision of the Supreme Court that the said statute was construed in express words so as to affect admiralty actions.

The Supreme Court in affirming the said Circuit Court of Appeals has therefore now finally construed this statute, and in the opinion of the court, by Mr. Justice VanDevanter, the following appears:

"The election is between alternatives accorded by the maritime law as modified and not between that law and some nonmaritime system."

94 "But it is insisted that even if the statute brings those rules into that law, it is still invalid in that it restricts the enforcement of rights founded on them to actions at law and thereby encroaches on the admiralty jurisdiction intended by the Constitution. It must be conceded that the construction thus sought to be put on the statute finds support in some of its words."

"It therefore is reasonable to believe that had Congress intended by this statute to withdraw rights of action founded on the new rules from the admiralty jurisdiction and to make them cognizable only on the common-law side of the courts, it would have expressed that intention in terms befitting such a pronounced departure, that is to say, in terms unmistakably manifesting a purpose to make the resort to common law remedies compulsory and not merely permissible. But this was not done. On the contrary, the terms of the statute in this regard are not imperative but permissive. It says 'may maintain' an action at law 'with the right of trial by jury,' the import of which is that the injured seaman is permitted but not required to proceed on the common law side of the court with the trial by jury as an incident; the words 'in such action' in the succeeding clause are all that are troublesome. But we do not regard them as meaning that the seaman may have the benefit of the new rules if he sues on the law side of the court, but not if he sues on the admiralty side * * * on that side (admiralty) the issues will be tried by the court; but if he sues on the common law side, there will be a right of trial by jury."

95 It is now apparent that the construction as to an election in its legal significance being a bar, which was the basis for the granting of the motion here, no longer is the correct one.

The words "at his election" become really meaningless as stated in my previous opinion and this necessity for a choice expressed in the statute becomes but a statement in different words of the long standing, familiar rule of the res judicata. That is, that a seaman can have but one trial of all his causes of action either on the admiralty side before a judge or on the common law side before a jury. While, therefore, the order complained of is right if plaintiff had been allowed to litigate in his admiralty action this question of negligence such decree is a bar only as to such issues as were litigated or which plaintiff could have litigated.

This leads us to the second alleged obstacle, whether the Maryland decree for maintenance and cure is res judicata of the negligence issues.

Plaintiff was only allowed on the admiralty trial his maintenance and cure, which in no sense depends on negligence for its allowance. The decree was for the nominal sum of $500.00 and for maintenance and cure alone. No one can doubt that the claim by plaintiff that he was seriously injured by negligence has not actually been litigated. The learned trial judge expressly stated that it was unfortunate that he could not allow him to do so. Plaintiff now seeks to litigate such claim. It is properly here for that purpose.

It is my opinion that both justice and a fair consideration of the actual facts indicate that all plaintiff has so far been allowed to litigate is the question of his rights under the former maritime
96 law and not his rights under the maritime law as modified by the statute.

These rights are different causes of action. It does not seem necessary in this case, with this decree for maintenance and cure only, to make plaintiff depend on the right to appeal from it. The causes of action are separable and plaintiff can be given his day in court without an appeal as to the question of an allowance over which there is no dispute.

This being so it does not seem to me that a decree allowing him $500.00 for maintenance and cure and not based on negligence is a bar to an entirely different cause of action for negligence on the part of the master or the crew, which was expressly not allowed to be litigated on the said trial. Plaintiff of course cannot recover in this action any further allowance for maintenance and cure and it may well be that a finding that the ship was seaworthy and that her appliances were sufficient is binding in this present action.

A decree can be used as conclusive evidence of certain facts even though it is not a bar to an entire cause of action.

Cromwell *v.* Sac, 94, U. S., 351; Shoemach Co. *v.* U. S., 258 U. S., 451 at page 458; U. S. *v.* Railway Co., 259 U. S., 214 at page 240; Hottelet *v.* Garden City Co., 285 Fed. Rep., 693 at page 696.

While plaintiff had a fair trial in his admiralty suit of such issue as was alone allowed to be presented the decree itself
97 was limited to the question of maintenance and cure and the question of negligence of the master and crew was plainly left open.

I can see no injustice to defendant under such circumstances in allowing plaintiff to have his day in court as to this question of negligence.

From now on there can be no danger of two suits, one in admiralty for maintenance and cure, unseaworthiness of the ship, etc., and one at law for negligence on the part of the master and crew, for henceforth the trial court in admiralty can award the proper damages and amount, or at law submit same to a jury.

Seamen will now have their single day in court on all issues either in admiralty or at law. Plaintiff has not yet had his day and the question of election no longer interferes with his right to do so.

Hence the motion of plaintiff to vacate the order heretofore made dismissing the complaint should be granted and the issue as to negligence of the master and crew raised by the pleadings should be restored to the calendar for trial.

R. A. INCH,
U. S. D. J.

That thereafter, on the 20th day of May, 1924, the said judge granted an order granting the motion for reargument, and ordered that the order entered herein on February 25, 1924, dismissing the complaint, be vacated and set aside, and that the action be restored to the day calendar of said court, as follows:

98 In United States District Court, Eastern New York

[Title omitted.]

Order granting motion for reargument May 20, 1924

A motion on behalf of the plaintiff for a reargument of a motion made by defendants on the pleadings for an order directing judgment dismissing the complaint herein on the ground that the action is res adjudicata, having duly come on to be heard before me on the 28th day of April, 1924.

99 Now, upon reading and filing the order to show cause with proof of service thereof, the affidavit of Edgar J. Treacy thereto annexed, duly verified, April 31st, 1924, in support of said motion, and the affidavit of Joseph M. Dreyer, duly verified April 28th, 1924, in opposition thereto, and upon the pleadings and proceedings herein, and after hearing counsel for the respective parties and due deliberation having been had, now on motion of Edgar J. Treacy, attorney for the plaintiff, it is

Ordered that the said motion for a reargument be and the same hereby is granted, and it is further

Ordered that the order entered herein on February 25th, 1924, dismissing the complaint be and the same hereby is vacated and set aside, and it is further

Ordered that the above-entitled action be and the same hereby is restored to the day calendar of this court for trial.

Enter.

R. A. INCH,
U. S. D. J.

In United States District Court, Eastern New York

Statement of evidence

That afterward, to wit: On the 6th day of October, 1924, the issue joined in the said cause between the said parties (pro ut the pleadings) came on to be tried before the Honorable Edwin L. Garvin, United States District Judge and a jury; the plaintiff

being represented by Edgar J. Treacy, Esq., as attorney, and the defendant by Nathan A. Smyth, Esq., its attorney, and J. Ralph Hilton, Esq., of counsel.

The jury being impanelled and sworn, counsel for plaintiff opens the case to court and jury.

100 *Colloquy between court and counsel*

The COURT. Does the defense desire to present his case to the jury now?

Mr. HILTON. No; your honor.

The COURT. Call your first witness, please.

Testimony for the plaintiff

Mr. TREACY. I offer in evidence a notice to produce, admission of service by both defendants.

The notice to produce is marked "Plaintiff's Exhibit No. 1."

Mr. TREACY. I ask the defendant to produce his pay roll for this voyage as called for in our notice to produce.

Mr. HILTON. I haven't it here. I haven't all my papers here and I am not sure whether we have the pay roll. Our papers are on the way over here now.

Mr. TREACY. Well, then, I will not call for any of these documents until two o'clock.

VERNON L. PHILIPPS, Jr., being duly sworn and examined as a witness for the plaintiff, testifies:

By Mr. TREACY:

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. How old are you now?

A. Twenty-one.

Q. Where is your home?

A. In Smyrna, Delaware.

Q. In the spring of 1921 were you a member of the crew of the steamship "West Cape"?

A. Yes, sir.

101 Q. Before you signed on as a member of the crew, what kind of work had you been doing?

A. I was going to school.

Q. What school had you been going to?

A. The Wesleyan Collegiate Institute.

Q. Was that a preparatory school of some sort?

A. Yes.

Q. Something like our high school?

A. Yes, sir; to prepare for college.

Q. Had you been working during the vacation?

A. Yes.

Q. How was your health at the time you went on board the ship—your general condition of health?

A. Fine.

Q. How much did you weigh?

A. I only weighed between 155 and 160 pounds when I was hurt.

Q. You were in good condition, though, were you?

A. Yes.

Q. Had you followed any athletics at school?

A. Yes; I pitched ball at the school I went to.

Q. Did you do anything else besides play ball?

A. I played basket ball; yes, sir.

Q. And you studied, too, I suppose?

A. Yes.

Q. You worked in the vacations?

A. Yes, sir.

Q. And you know Mr. Stayton, the president of the Baltimore Steamship Company?

A. Yes.

Q. Did his boy go to school there in the town?

A. He went to school there.

Q. You knew his boy in Smyrna?

A. Yes.

Q. Was there any other of these boys that signed on the "West Cape" when you went on?

A. Yes, sir; there were four, altogether.

Q. Were they all schoolboys?

A. No.

Q. They were not?

A. No, sir.

Q. Where did you join the ship?

A. In Baltimore.

102 Q. Had you ever been at sea before?

A. No, sir.

Q. You had been on ships before, had you?

A. No, sir.

Q. You had never been on a ship before?

A. No, sir.

Q. Did you know that you were down here on the articles as an able-bodied seaman?

A. Yes.

Q. You say you had never been at sea before?

A. No, sir.

Q. Did your ship take on cargo at Baltimore, do you know?

A. I really don't know.

Q. You had nothing to do with that, did you?

A. No.

Q. Whatever of that work was done was done by the stevedores?

A. Yes.

Q. Where did you go after you left Baltimore?
A. I think we went to Norfolk.
Q. Norfolk, Virginia?
A. Yes.
Q. And from there where did you go?
A. We went to Glasgow, Scotland.
Q. What were you carrying?
A. Coal and wheat; I can remember those two.
Q. Did you unload anything at Glasgow?
A. I am almost sure it was wheat we unloaded in Glasgow.
Q. Where did you go from there?
A. To Swansea, Wales.
Q. And then where?
A. To Limerick, Ireland.
Q. How long were you in the port of Limerick?
A. I judge around three weeks.
Q. Was all of what was left of your cargo discharged there?
A. Yes, sir.
Q. When you started—you know that you came home in ballast, don't you?
A. Yes; water ballast.
Q. It was in the month of June, 1921?
A. July.
163 Q. How long were you at sea before anything happened to you?
A. How long was I out at sea?
Q. How long were you out at sea, coming out from Limerick, before any accident happened?
A. I should judge about fourteen or fifteen days.
Q. You were doing duty right along, were you?
A. Yes.
Q. Do you remember any work that you were called upon to do on Sunday, the 24th of July? Was that the day you were hurt?
A. Yes, the 24th of July, 1921.
Q. That is the correct date of your injury?
A. Yes.
Q. Were you called on to do any work that day?
A. Sure; to clean out the bilges.
Q. What had you been doing before you were called on to do this work?
A. Steering the ship.
Q. What time did you go on watch?
A. From eight to twelve.
Q. From eight o'clock in the forenoon?
A. From eight to twelve in the evening and the morning, both.
Q. You were on the morning watch at that time, were you not?
A. Yes, I was on the morning watch.
Q. What time did you get through your trick at the wheel?
A. At ten o'clock.

Q. You were still on watch until noon?
A. Yes.
Q. You were liable to be called for duty?
A. Yes.
Q. Were you called for duty?
A. Yes.
Q. Who called you for duty, do you know?
A. The captain.
Q. What was his name?
A. Captain Baker.
Q. He was the master?
A. Yes.
Q. What did he tell you to do?
A. He told me to go down in the No. 1 hold and take orders from the first mate, Clark.
104 Q. To take orders from the first mate?
A. Yes, sir.
Q. His name was Clark?
A. Yes.
Q. Did you go to No. 1 hold?
A. Yes.
Q. Where is the opening of No. 1 hold situated?
A. It is forward, the first hatch.
Q. The first hatch is forward, is it?
A. Yes.
Q. About how wide is it, roughly speaking?
A. About 25 feet.
Q. That is a sort of an oblong opening in the deck, is it?
A. Yes.
Q. You went over to that hatch and it was open?
A. Yes.
Q. The hatch covering was off?
A. Yes.
Q. And you went down into the hold?
A. Yes.
Q. Did you stay on the between decks there?
A. No, sir; I went down in the bottom.
Q. You went right below the between decks?
A. Yes, sir.
Q. Did anybody go down with you?
A. No, sir.
Q. When you got down there did you find any other men there?
A. Yes.
Q. Who was there that you remember?
A. Willoughby Joseph, the carpenter of the ship.
Q. About how many seamen were down there?
A. I should think five or six.
Q. Was there any officer of the ship down there?
A. Yes; the first mate.

Q. Mr. Clark?
A. Yes.
Q. Did he tell you to do anything?
A. Yes, sir: he told me to clean out the bilges.
Q. Were the strongbacks on the between decks at that time, that you recall?
A. I don't know.
Q. You don't know whether they were on or not?
A. No.
Q. You simply carried out your orders?
A. Yes, sir.
105 Q. Did you see any hoisting going on there?
A. Yes, sir: they were cleaning dunnage out of the hatch.
Q. How did they do that?
A. They were taking it out by aid of a winch.
Q. A steam winch?
A. A steam winch, yes: they carried all the rubbish out and were taking dunnage up by aid of the winch.
Q. What was the dunnage?
A. Little pieces of sticks.
Q. Little pieces of lumber, timber?
A. Yes.
Q. You say they were hoisted up by means of a steam winch?
A. Yes, sir.
Q. You had nothing to do with that?
A. No, sir.
Q. Did the first officer tell you to turn to when you got down there?
A. He told me to clean out the bilges——
Mr. HILTON. Objected to as suggestive and leading.
Objection sustained.
Q. What did you do when you got down there?
A. I cleaned out the bilges.
Q. What are the bilges?
A. I don't know: they are off on the sides and this wheat sifted through them and I was taking it out by the aid of a bucket.
Q. Some wheat had got through the ports?
A. Yes, sir.
Q. Onto the bottom of the ship?
A. Yes, sir: onto the bottom of the ship.
Q. You started to scoop that out and put it in a bucket?
A. Yes.
Q. Did anyone tell you to do that?
A. The first mate, Mr. Clark.
Q. He told you to turn to and take that stuff out?
A. Yes.
106 Q. What part of the ship were you working at?
A. On the starboard side.

Q. Were you well to starboard, way up against the side?

A. Yes.

Q. What position were you working in? Were you standing up or leaning down?

A. I was sitting down.

Q. How long had you been working there before anything happened to you?

A. Well, I don't know; I should judge around an hour.

Q. You know something happened to you then?

A. Yes, sir.

Q. Tell us what you know about it.

A. Well, while I was cleaning out the bilges—I don't know what happened, but I heard someone holler, "Look out below," and I had to get out as quick as possible. There was an incline and I had both feet down in the bilges, in the hold, and tried to get up as quick as I could, but I didn't succeed.

Q. You tried to get out of the way of it?

A. They hollered, "Look out below," and I was trying to get out of the way.

Q. Did you feel anything?

A. No, sir; I didn't feel anything.

Q. You didn't feel anything at all?

A. No, sir.

Q. What happened?

A. I guess I must have got my right foot out, and when I was going up by the side a beam came down and I could feel the wind of it as it came, and that was all I knew.

Q. A big iron or metal beam?

A. Yes. When it fell on my leg I leaned against it and pushed against it, but it was all done quick.

Q. You say it fell?

A. Yes, sir; and I pushed against it, yes, sir, and felt it.

Q. Which leg?

A. My left leg.

Q. How big was the beam, about?

A. I have no idea.

107 Q. Roughly give us an idea?

A. It was about 25 feet long.

Q. What does it weigh, about? Have you any idea?

A. I should judge a ton.

Q. You knew what it was, didn't you?

A. Yes, sir.

Q. You had seen them before?

A. Yes.

Q. You knew it was a strongback, didn't you?

A. Yes.

Q. But you didn't know how it came out?

A. No, sir.

Q. You have said how it was lying on your leg. Tell us everything you remember after that, from that point on.

A. Right away, the first thing I said was I wished I could die, I was in such agony; and they didn't know how to stop the flow of blood and Willoughby Joseph was a fellow from my home town. He had been in France and had had a little bit of experience in that line and he came and helped hold the big artery of my leg up here [indicating], and then he sent some one after a sheet to make a tourniquet, which they made afterwards.

Q. Could you see what your leg looked like?

A. My foot was erect like that [illustrating] and was flapping around and this other part of my leg was perfectly still.

Recess till 2 p. m.

Met pursuant to adjournment at 2 p. m.; present as before.

Vernon L. Philipps, jr., resumes the stand.

Direct examination continued by Mr. TREACY:

Q. Will you go on and tell us everything that went on from that time?

108 A. After they sent for the sheet Willoughby made a tourniquet out of the sheet and stopped the blood as much as possible, and after that was done they got a bunk and took me up out of the hold by the aid of the winch and then there was a doctor brought on board the ship—I don't know where he came from——

Q. You had no doctor on board?

A. No, sir.

Q. You don't know where this man came from?

A. No.

Q. Did he do something for you on deck?

A. Yes.

Q. Tell us about that.

A. There was a gash in my leg and he fixed it up, and afterwards he gave me some anesthetic—he gave me some anesthetic first and then he fixed the leg up and wrapped it up as well as he could and then they transferred me to the other ship with a lifeboat, and I was out at sea two days and then went in.

Q. There is a marine hospital at Norfolk?

A. A public hospital; yes.

Q. What was done with you?

A. I was there two days and then they amputated my foot, and two days after that they amputated it again and they didn't give me any anesthetic that time, for they said my heart was too weak.

Q. Did you suffer much while they were taking the foot off?

A. Yes, sir. Two weeks after it again they cut it off and they never gave me any ether that time, either. That was the worst time, because they cut off the bone. It took about twenty minutes. It was an awful pain; it was terrible.

Q. How far up on your leg did they cut on that occasion. Show on your right leg?

A. Well, I had about a 6-inch stump below the knee at that time.

Then about two weeks after that they had to make an incision
109 of the leg, and it was affected further up, and they cut it up along on the inside of my leg.

Q. What was done with you after that?

A. Just bandaged the leg after that and I never had any more amputations there, and I came home.

Q. Where did you go after leaving the hospital? Did you go to your home in Smyrna?

A. Yes.

Q. How long were you in the marine hospital?

A. A hundred and twenty-two days.

Q. And you had four amputations there?

A. Yes; three amputations and one incision.

Q. Four operations, I should have said?

A. Yes, sir.

Q. Tell us how your condition progressed when you got home?

A. I had to have my leg dressed sometimes once a day and sometimes twice a day. The doctor used to come down and dress my leg at home and I stayed home, I should think, about two weeks, and then went up to Philadelphia to a hospital, the Methodist Episcopal Hospital at Philadelphia.

Q. Was that a public institution?

A. No, sir. I had another amputation there. I was amputated above the knee, where it is now. I only stayed in there eleven days and then came home.

Q. How far above the knee was that leg amputated?

A. About 3 inches, I should think.

Q. The stump comes down to within about 3 inches of the knee?

A. Within about 3 inches of the knee.

Q. Measuring alongside of the useful leg?

A. Yes.

Q. How long were you in the Philadelphia hospital?

A. Eleven days.

Q. Where did you go from there?

A. I went home.

110 Q. You have had no other operation since then?

A. No.

Q. You went home, and except for the raw stump you were in the condition that you are in now?

A. Yes.

Q. How long was it before that healed up?

A. I should think about six weeks.

Q. What rate of wages were you getting on board the "West Cape"?

A. $72.50 a month and maintenance.

Q. How is the maintenance figured out?

A. $3.00 a day.

Q. That is your food and lodging?

A. Yes.

Q. Are you married?
A. Yes, sir; I have a wife and child.
Q. While you were in the hospital on or about the 6th of August did you get this letter from the Baltimore Steamship Company with the enclosures that are attached [handing witness paper]?
A. Yes, sir.
Mr. TREACY. I offer in evidence the letter and enclosures.
They are marked "Plaintiff's Exhibits B, C, D, and E."
Q. On or about the 29th of October did you get this document from the Baltimore Steamship Company while you were in the hospital [handing witness paper]? A. Yes, sir.
The paper is handed to Mr. Hilton.
It is offered in evidence and is marked "Plaintiff's Exhibit F."

Q. On or about the 28th day of November while you were
111 in the hospital at Norfolk did you get this letter and the three enclosures from the Baltimore Steamship Company?

A. I don't know whether I received that in the hospital or not; either I was at home or I left about that date.
Q. Did you finally get them by mail somewhere?
A. Yes.
The papers are handed to Mr. Hilton.
Mr. TREACY. I offer them in evidence.
The letter is marked "Exhibit G" and the three vouchers are marked "H," "I," and "J."
Exhibits G, H, I and J are handed to the jury.
Q. You never had anything the matter with your leg before this accident, did you?
A. No, sir.
Q. You had a perfectly normal left leg?
A. Yes, sir.
Q. You never had any other injury to it except the one that occurred on the "West Cape"?
A. That is right.

Cross-examined by Mr. HILTON:

Q. When you were on this trip on the "West Cape" were you a married young man?
A. No, sir.
Q. Are you married now?
A. Yes, sir.
Q. Have you any children?
A. Yes, sir.
Q. How old is your child?
A. It is going on fourteen months old.
Q. When were you married?
A. On May 14, 1923.
Q. This accident happened in July, 1921?
A. Yes, in July, 1921.

Q. July the 24th, 1921?
A. Yes, sir.
Q. At what are you working now?
A I am not working at anything now.
112 Q. Are you supporting your wife?
A. No, sir.
Q. And child?
A. No, sir.
Q. Did you work in a barber shop?
A. Yes, sir.
Q. Were you the manager of the barber shop?
A. Why no; I run it for a fellow I know, and the man that had the barber shop died and I was not doing anything at the time, and I knew a little bit about barbering and so he got me to attend to the shop until he got a barber. I couldn't get anything to do.
Q. How much did you earn in running the barber shop?
A. It was $12 a week.
Q. When was that?
A. That was about—that was around November and December of 1923, I think; yes, I am sure it was.
Q. It wasn't 1922, was it?
A. I am not sure; I don't know whether it was 1922 or 1923. It was in November and December that I worked there.
Q. After that what work did you do?
A. I worked in a cigar store, in a pool room.
Q. Was this in Smyrna, Delaware?
A. Yes.
Q. Were you the manager of the cigar end of the pool room?
A. I went to work for a fellow and worked, I should judge, for him about three weeks and after that my father bought the pool room for me, and after that I sold out.
Q. Oh; did you own—you sold that out?
A. My father sold the pool room to another fellow.
Q. Did he own the pool room?
A. He bought it, yes.
Q. That is, the tables?
A. Two tables.
Q. What was your position there?
A. I just attended to the pool room.
Q. How much did you earn a week?
A. When I was working for the other fellow?
113 Q. Were you working for your father or for another fellow?
A. At first I was earning $10 a week from the fellow that I worked for before I bought him out, and after that we couldn't make a go of it, so we sold out.
Q. Did you buy the pool room?
A. No; my father did.

Q. Did you buy any part of it?
A. No, sir; I never had any money.
Q. After that, when your father owned the pool room, how much did you earn a week?
A. Well, I should think I earned about the same amount of money, about $10 a week.
Q. How long did you and your father continue running the pool room?
A. Well, at a rough estimate, four or five months.
Q. When was that discontinued?
A. It was in July that he sold the pool room.
Q. And he discontinued it five or six months later?
A. No; that was when he sold the pool room. He bought it in March, I think it was.
Q. That was not this last July?
A. No, sir.
Q. July a year ago or two years ago?
A. Two years ago, I guess.
Q. Well, it was after your accident?
A. Yes, sir.
Q. What other work did you do?
A. That was all I did, was the barber shop and in the pool room.
Q. Have you held any other positions?
A. I went back to work for the man that bought the pool room from my father. I worked for him about three months, and then business got slow with him and I quit. Of course, he told me to quit, and I laid around for I don't know how long; I should think about two months.
Q. Doing nothing?
A. Yes, sir. I couldn't get a job. Then business picked up
114 a little bit and he gave me the job back again, and I worked for them about two months, I guess, and business got dull again.
Q. How much were you earning then?
A. $9 a week.
Q. Where were you living?
A. In Smyrna.
Q. With your father?
A. Yes, sir.
Q. Your wife and your child and yourself were living at home with your father?
A. Yes.
Q. He was supporting you, to a certain extent, and you were, partially; you were earning money?
A. Yes.
Q. How old are you?
A. I am twenty-one now.

Q. Was the young lady you married a young lady from Smyrna?
A. Right outside of Smyrna, about two miles.
Q. Is she employed?
A. At present; yes, sir.
Q. Since working for the man who bought your father out in the pool room, since working for him, what have you done?
A. Nothing; only barbering for about three months.
Q. Running a barber shop?
A. No, sir; working for a man.
Q. In what capacity? Manager or what?
A. No, sir; I was on the last chair.
Q. You were a barber?
A. Yes.
Q. How much as a barber did you earn a week?
A. $18 a week.
Q. How long did that employment continue?
A. Just about three months.
Q. About when was that?
A. That was in—I really don't know; it was in July, August, and part of September of last year.
Q. A year ago?
A. Yes, sir.
Q. Since then what work have you been doing?
115 A. Nothing; only I went back to work in the pool room again and worked there, just about four months.
Q. Are you coming along to this year now?
A. Yes; I worked up to last Decoration Day.
Q. How much did you earn within a year per week?
A. Nine dollars.
Q. What do you do in the pool room?
A. Clerk; I sell cigars or cigarettes, whatever there is to do.
Q. Do you stand at a counter, or do you move around a room?
A. I am going all over.
Q. Do you serve soft drinks?
A. Yes.
Q. And cigars and cigarettes?
A. Yes.
Q. You have not been working during the last week, I presume? You have been here in New York?
A. Yes; I have been working. I came back Wednesday evening.
Q. You came from Smyrna?
A. Yes.
Q. Before that had you been working in Smyrna?
A. No.
Q. You have not been working since Decoration Day?
A. Not since Decoration Day.
Q. After the accident you went to a marine hospital?
A. Yes, sir.

Q. Where was that?
A. That is about seven miles outside of Norfolk.
Q. After you went into the hospital just how long did you stay there, before you left?
A. How many days was I in the hospital?
Q. Yes.
A. One hundred and twenty-two days.
Q. Continuously?
A. Yes.
Q. Then you left to go where?
A. I went to my home.
Q. Your leg had been amputated then in the hospital?
A. Yes, sir.
Q. Did you leave there against the advice of the physicians in the hospital?
A. Well, he didn't want me to leave.
116 Q. What did they say?
A. They wanted to operate on me again without giving me ether, and I didn't feel I could stand it because it was an unmerciful pain.
Q. When you went back to Smyrna after leaving the hospital against their wishes, what happened then?
A. Well, I had a doctor home to attend to me for about two weeks, I should think: I don't know exactly how many days. Then I went to Philadelphia.
Q. On the advice of this doctor?
A. Yes, sir.
Q. He advised you that now while you were at home there was some gangrene?
A. No, sir: I had gangrene when I was down in the Norfolk hospital.
Q. And they wanted to keep you there, but you left?
A. Yes: they wanted to operate on me again and I didn't feel as if I could stand it. I would rather have died than be operated on without ether again.
Q. After that you had to leave your home for an additional operation?
A. Yes.
Q. And you testified that you went to Philadelphia?
A. Yes.
Q. At the time of the accident you were down in the hold?
A. Yes.
Q. At the forward end of the ship?
A. Yes: No. 1 hold: yes, sir.
Q. That is forward, isn't it?
A. Forward, yes, sir.
Q. As far forward as you can get on a ship?
A. Yes.

Q. Because No. 1 hold is the furthest forward hold?
A. Yes.
Q. Who else was down in the hold with you?
A. Willoughby Joseph and a carpenter, and Clark. They were the only ones that I can remember. There were a couple of other fellows there.

117 Q. Clark was one of the officers?
A. Yes; the first officer.

Q. And Willoughby Clark was a friend of yours from Smyrna?
A. No, sir; Willoughby Joseph——
Q. Willoughby Joseph, I mean, was a friend of yours from Smyrna?
A. Yes.
Q. Was he the boatswain?
A. He was supposed to be; yes, sir.
Q. Well, he was, wasn't he?
A. I think they made him boatswain; yes, sir.
Q. This trip of the cargo ship started in May, I think; May 19 you signed on; you became a member of the crew on May 19, 1921?
A. Yes.
Q. Where did you sail from? Philadelphia?
A. Yes.
Q. Where?
A. I think to Norfolk.
Q. And then to where?
A. To Glasgow, Scotland.
Q. Was there a strike on the ship, a strike of the seamen?
Objected to as incompetent, irrelevant, and immaterial.
Question withdrawn for the present.
Q. When you first sailed who was the boatswain?
A. He was some Swedish fellow; I don't know his name.
Q. What happened to him?
A. He got stabbed.
Q. Then there was another boatswain succeeding him?
A. Willoughby Joseph?
Q. No. Were there three or four boatswains before Josephs was appointed boatswain?
A. I don't think so; no.
Q. Well, there was one?
A. Yes, sir.
Q. Who had been stabbed; some Swede?
A. Yes, sir.

118 Q. Where did that happen? I mean, where did he cease to be boatswain?

Mr. TREACY. Objected to as immaterial and irrelevant.
The COURT. I will take it. The person who was stabbed is out of the case, but his successor is what Mr. Hilton is asking about.
Objection withdrawn.
Q. Where did the Swedish man cease to be boatswain?

A. I think it was in Glasgow, Scotland; I would not say positive, but it was in port, anyhow.

Q. Was there a strike among the seamen at Glasgow?

Objected to as incompetent, irrelevant, and immaterial.

Objection overruled.

Exception.

Q. Was there a strike among the seamen in Glasgow?

Mr. TREACY. I ask that this question be defined.

Mr. HILTON. I am only speaking of the crew of the ship.

Q. (Repeated.) Was there a strike among the seamen in Glasgow?

A. I don't know.

Q. Was there a strike among the seamen on the ship anywhere on the trip?

A. Do you mean in the United States?

Q. On the ship?

A. No; not that I know of.

119 Q. Wasn't there a strike among the seamen while you were on the ship?

A. Not that I know of.

Q. So that some left?

A. No, sir; not that I know of.

Q. Do you recollect who succeeded the Swede as boatswain?

A. Willoughby Joseph, I think.

Q. How many boatswains were there on the ship on the trip you took?

A. Two, I think.

Q. Where did the Swede leave the ship?

A. It was either at Glasgow, Scotland, or Swansea, Wales.

Q. Where did your accident happen in respect to either Glasgow or Swansea?

A. It happened out at sea.

Q. After you had left Swansea, or before you got there?

A. No, sir; it happened on the way back. We had left Limerick, Ireland, the last port.

Q. When had you been at Swansea, before leaving that port?

A. We went to Glasgow first and then to Swansea next, the next port, and then to Limerick last.

Q. How long after you left the last port did the accident happen?

A. I should think about fourteen or fifteen days; I don't know exactly, but I think around that time.

Q. Joseph had served as boatswain only from either Glasgow or Swansea up to the time of your accident, had he not?

A. I think so, yes.

Q. That is the only experience, so far as you know, that he had as boatswain?

A. Yes.

Q. And that was because another man had left; that was because the Swede had left?

Objected to as incompetent, irrelevant and immaterial and calling for this witness's conclusion.

120 The COURT. What difference does the reason make? Objection sustained.

Mr. HILTON. Exception.

Q. About how old a man was the Swede boatswain?

A. I should judge he was about thirty-five.

Q. How old a man was Joseph?

A. I think he told me he was twenty-six at that time.

Q. When the Swede boatswain was hurt there was not any other boatswain on the boat, was there?

A. I don't know whether there was or not.

Q. How many boatswains were there on the boat? There is only one on a cargo ship, isn't there?

A. That is all there is supposed to be, I think.

Q. Then Joseph was appointed in the place of the Swede who had left?

A. I think so; yes, sir.

Q. Had you known Joseph before?

A. Yes, sir.

Q. So far as you know had he had any experience as a boatswain previous to that appointment?

A. No, sir; he never had.

Q. He had been at sea before, had he not?

A. He went across to France and came back with the marines; that is all. He told me that.

Q. With the marines?

A. Yes, sir.

Q. So far as you know had he served at sea on a cargo ship?

A. No; he just went across to France and came back with the boys, when they went across.

Q. He had had that experience but had he not also been a seaman?

A. Not before this time; no, sir.

Q. How many seamen were there on this cargo ship, the "West Cape"?

A. Ordinaries and A. B.s both?

121 Q. A. B.s?

A. Six, I think.

Q. And he was one of the six?

A. Before he was boatswain.

Q. Before he was boatswain; after the Swede left they appointed one of the six to be boatswain?

A. Yes.

Q. The captain, I assume, did that?

A. I don't know who did it.

Q. Well, some one did, some officer?

A. Yes.

Q. A. B.s are those who are supposed to have had experience as seamen, are they not?
A. I think they are; yes.
Q. And ordinaries are not?
A. Yes.
Q. And Joseph was an A. B., one of the six?
A. Yes; he was one of the six.
Q. Coming down to the day you were hurt, you were down in the hold doing some work?
A. Yes.
Q. Who else was with you?
A. Willoughby Joseph and the carpenter and first mate. There were three more, maybe; I can't remember how many; it has been almost four years.
Q. What were you doing?
A. I was cleaning out the bilges.
Q. Were others cleaning out the bilges?
A. No, sir; only Mr. Clark was helping me.
Q. He was an officer?
A. Yes.
Q. The first officer?
A. Yes.
Q. And the other men were doing what?
A. They were taking timber—loose pieces of timber—out of the hatch.
Q. Collecting them together, wrapping them up, and they were being hoisted out through the hatchway?
A. Yes.
Q. How long were the loose pieces of timber, about, generally?
A. Oh, I don't know; I should think about 5 feet some were; they ran different sizes.
122 Q. Was Joseph engaged in that work?
A. Yes.
Q. What was the timber fastened to?
A. It had a sling around it. They were taking it up by the aid of a hook.
Q. What was the sling made of?
A. Rope.
Q. Wire or what?
A. Rope.
Q. Hemp rope?
A. Yes.
Q. Did you see the sling load go up just before the strongback fell?
A. No, sir; I was taking the wheat out of the ship.
Q. You were not looking at that load going up?
A. No, sir; I was cleaning out the wheat.
Q. Did you see who fastened that load? Did you see who put the rope around it?
A. No, sir; I did not.

Q. You heard who said "Keep away" or "Hoist it up," didn't you?

A. I may have, but I don't recollect.

Q. You don't recollect who gave the order to hoist it up?

A. No, sir.

Q. It was hoisted up by a winch, wasn't it?

A. Yes.

Q. Who was in charge of the winch?

A. I think the second mate was.

Q. Was there anyone at the hatch signaling?

A. Why, I don't know; I don't know.

Q. Where was Mr. Lapoint?

A. I really don't know; I was assigned my duty when I went down in the hold.

Q. Who called to you?

A. The captain told me to go down in the hold and I would take orders from the first mate.

Q. You don't understand my question; at the time the strongback was falling, who yelled at you?

A. I don't recall.

Q. Do you remember your suit tried in Baltimore?

A. Yes, sir.

123 Q. Before Judge Rose?

Mr. TREACY. Objected to unless it is for the purpose of impeaching or contradicting the witness.

The COURT. Is that the purpose?

Mr. HILTON. Yes, it is for that purpose.

Objection overruled.

Mr. TREACY. I will withdraw my objection.

A. Yes.

Q. This question was asked you:

"Q. And you called out to get away from under the square of the hatch?

"A. Yes.

"Q. And Joseph, the boatswain, he heard that call and did get away?

"A. I think Mr. Lapoint was the one that hollered, the third mate."

A I think it was the third mate, yes; Lapoint was the third mate.

Q. Well, it is your recollection, is it, that he hollered?

A. I don't really remember now, it has been going on four years.

Q. When you were a witness in this trial in Baltimore do you remember testifying: "I think Mr. Lapoint was the one that hollared, the third mate," and was your recollection good then on that point?

A. It was better than it is now, I should think; it has been over a year, or a year.

Q. You heard someone holler, did you?

A. Yes, I heard someone holler.

Q. What did they holler at you?
Objected to.
Q. Well, there were several of you down in the hold?
A. Yes.
Q. Did someone holler?
A. Yes.
Q. What did someone holler, either Mr. Lapoint or somebody else?
A. It was, "Look out below," or words to that effect. I don't just remember what it was now.
Q. "Look out below," or that in substance?
A. Yes.
Q. Where was Mr. Lapoint?
A. I think he was up above, around the winch some place, I think he was; he wasn't there when I was down in the hold; I never saw him.
Q. You didn't see him when you went down in the hold?
A. No, sir.
Q. Joseph jumped aside when the beam was falling, did he not?
A. I guess he did; yes, sir.
Q. Did you see Joseph move, jump?
A. I was getting out of the way myself. I wasn't paying much attention to anybody else.
Q. You were trying to get out of the way?
A. Yes.
Q. Did you see other men trying to get out of the way down there?
A. I can't say I did, because it was all done in just a second. I hollered, but I don't remember what I hollered.
Q. What did you holler?
A. I don't remember what I hollered.
Q. What caused you to holler?
A. Somebody else hollering, that is a rule on a ship.
Q. You hollered in substance, "Get out of the way"?
A. Yes.
Q. You don't pretend to remember the words, but that was the intent?
A. Yes.
Q. You hollered something which was intended to get yourself and others out of the way?
A. Yes.
Q. The chief officer was down there by you?
A. Yes, sir.
Q. On the previous trial you testified that the chief officer was there, did you not——
Mr. TREACY. Objected to as not contradictory of anything the witness has said here.
The COURT. If it is mere repetition there is no use in wasting time.
Mr. HILTON. It is repetition.

Q. After the accident you were hoisted up from the hold, were you not?

A. Yes, sir.

Q. What were you on?

A. A bunk; I was on a bunk.

Q. Who else was on the bunk as it moved up?

A. Captain Baker.

Q. It was the same winch that was moving the dunnage that moved you up?

A. Yes.

Q. Did you notice whether any of the strongbacks before the accident occurred, whether any of these strongbacks were in the hatchway?

A. I don't know that.

Q. Did you or did you not know what was above you in the hatchway? Was the hatchway open or covered?

A. Do you mean were the hatch covers on?

Q. Yes.

A. Not where you went down, they were not.

Q. There are two hatchways, one between decks and one on the main deck of No. 1 hatch?

A. Yes.

Q. Were they open or closed?

A. There were not any hatch covers on where I went down.

Q. Where did you go down?

A. On the after part of the hold.

Q. From the top deck?

A. Yes, sir.

Q. Or between decks?

A. From the top deck.

126 Q. There was not any hatch, or were there on the between decks hatchway?

A. Not where I went down; no, sir.

Q. How big a space was there to go down?

A. There was not any hatch on them.

Q. Was the hatch completely opened or partly opened, or what?

A. Well, I don't know.

Q. You don't know?

A. No, sir.

Q. You went through there?

A. Yes, sir; I had plenty of room to get through.

Q. How much of a space was there?

A. I don't know.

Q. An inch or a square or what? Have you no idea of the space you went through?

A. I had plenty of room to go down.

Q. You don't know how many strongbacks or iron beams were in the top hatchway when you went down there?

A. No.

Q. Or in the between deck hatchway?
A. No, sir.
Q. Had they been pulling up the dunnage in other sling loads prior to this one?
A. Yes.
Q. Had you seen them go up?
A. Well, no, I had not, only at first I helped. I started to get the dunnage before he assigned me to do any other work.
Q. I understood you to say you saw them pulled up; that you saw some go up?
A. No, sir, I helped to get the dunnage first when the captain sent me down in the hold. I started to do what the rest were doing, and Clarke called me over and told me to clean out the bilges.
Q. How long had you been working down there?
A. I should say about an hour.
Q. During that hour had you seen dunnage loads going up?
A. I don't think so.
127 Q. Had they not pulled up a single dunnage load?
A. Yes, they had, but I was not doing that work.
Q. You were within a few feet of them, weren't you?
A. Yes, but when you are working on a ship you have got to work on your own work.
Q. But what is going on around you within 5 or 10 feet, you know that?
A. Not when you are down in the bilges.
Q. When you are doing something in the bilges and there are men five or six feet away and they are——
A. They don't allow you to do it; you don't see them unless you look up.
Q. You knew they had been carrying up dunnage?
A. Yes.
Q. And had been hauling it up in numerous loads?
A. I can't say numerous loads.
Q. Well, some loads?
A. Yes.
Q. Had you seen it go up through the hatch?
A. No, sir.
Q. Was there light coming down through the hatchway?
A. Yes, sir, there was plenty of light down there.
Q. With there being plenty of light where did you first see the strongback that fell down?
A. It was done all of a sudden, and I knew when it hit me; I pushed on it. I don't know what you mean; I saw it and pushed on it.
Q. How long, or was there any appreciable period from the time you heard them holler up there, or somebody hollered to get out of the way, until you were struck?

A. It was all done just like that (indicating by snapping his fingers).

Q. You don't know any more about the actual happening of the accident, as you saw it, than you have testified to, do you?

A. Yes, that is all I know.

128 Q. On your trial in Baltimore you didn't know anything more about it, did you?

Objected to. Objection sustained.

Exception.

Re-direct examination by Mr. TREACY:

Q. Do you have any pain in that injured leg now?

A. In my back; I have a little pain in my back.

Q. Whereabouts?

A. Right across the kidneys; right across here [indicating].

Q. Is that about your hip?

A. It is more down near the hip than the kidneys.

Q. Do you have that very often?

A. Only when I go to bed. I notice it more then, if I have been walking.

Q. Had you known the young woman that you married for some time?

A. Yes.

Q. Before you were injured?

A. Yes.

Q. Were you intending to be married before you were injured?

A. Before I went away; yes, sir.

Q. And you married her anyway?

A. Yes, sir.

Re-cross examination by Mr. HILTON:

Q. I would like to ask you this question: do you know how many strongbacks were on or off the hatch on the main deck?

A. No, sir; I do not.

Q. Do you remember these questions being asked you in the Baltimore trial:

"Q. How many strongbacks were there for this hatch, do you know?

"A. I couldn't say.

"Q. Do you remember how many were off?

"A. I think only one was off, but I am not positive."

Did you so testify?

A. I don't know for sure; I would not say positive; I don't remember.

129 Q. Do you remember being asked how many were off, and your answer then?

A. No, sir; I don't remember.

Q. Do you remember this question:

"Q. How about the between decks? Were there hatch covers on here?—A. I do not think there were any on there."

A. I don't remember.

Q. Do you recollect that question being asked you and making that answer?

A. No, sir, I do not.

Q. You simply don't remember?

A. No, sir.

Q. Do you know who was giving the signals?

A. There was not anyone giving signals I don't think, when I went down there.

Q. I will ask you this question: Do you recollect this question being asked you in the Baltimore trial:

"Q. Just say what was going on in regard to getting out this cunnage?

"A. Mr. Tall was at the winch, the second mate, and the third mate was giving signals with his hands."

Did you so testify?

A. I don't remember testifying that, no, sir.

Q. You gave your testimony in December, 1922, in the United States District Court, District of Maryland, in Baltimore. You recollect that it was that month, don't you?

A. It was the month, but I don't know about the year. It was in December.

Q. It was not last December, was it? It was December before last. Last December was 1923?

A. Yes.

Q. You don't dispute that that was the year and month, do you, of the trial?

A. No; it was in December; I remember that; but I don't remember the year.

Q. Well, at any rate, your recollection, was it better then as to who was giving the signals, than it is now?

A. Well, it should have been.

Q. Is your recollection as to the strongbacks, where you testified, I think, that only one was off, better then than it is now?

A. I never thought about the case any more. It should have been better naturally, yes, sir: it was.

Q. Did you see the third mate at the time looking down the hatches, who was giving signals?

A. I don't think I did; no, sir.

Q. I will ask you this question, asked you on the Baltimore trial immediately after the other:

"Q. Just say what was going on in regard to getting out this cunnage?

"A. Mr. Tall was at the winch, the second mate, and the third mate was giving signals with his hand.

"Q. Where was he standing?

"A. Standing looking down the hatch."

Did you so testify?

A. I don't remember it.

Q. Is your memory ordinarily good on these material facts?

A. Well, I never thought any more about the trial; I have never been asked anything about it.

Q. I am refreshing your recollection now. Does that refresh your recollection?

A. No, sir.

Q. The next question is:

"Q. Could Mr. Tall, from where he was, see down in the hatch from the winch?

"A. He could see partly down there, he couldn't see all that was going on down there. He could see at the other end."

Do you remember that question and answer?

A. No, sir.

Q. You don't recollect that either?

A. No, sir.

Q. Did you see Mr. Tall at the winch?

A. No, sir.

Q. What caused you to forget these facts?

Mr. TREACY. Objected to. There is no testimony here yet that Mr. Hilton is reading this man's testimony.

131 The COURT. You may ask him what caused him to forget, if he has forgotten, the other trial. Find out whether he testified that this condition did or did not exist. You can not bind him by somebody else's testimony.

Mr. HILTON. No; I am reading from his testimony.

Mr. TREACY. We don't know that you are.

Mr. HILTON. I do not think you really have any doubt about it.

Mr. TREACY. There is nothing before the court to show that there was any of this testimony at any other trial.

The COURT. Do you press the question in the form that it is now asked?

The question is read by the stenographer.

The COURT. Is it your statement that these facts did exist?

The WITNESS. I don't remember ever saying anything like that. It has been over a year ago or two years ago, and I don't remember.

The COURT. To what facts do you refer?

Mr. HILTON. Those I have brought out in the previous questions. The substance is that he has testified that there was one strongback off, and that the second mate was at the winch and the third mate was there giving signals, and where the third mate stood.

By the COURT:

Q. Do you remember so testifying?

A. No, sir; I do not.

132 By Mr. HILTON:

Q. You testified to-day that you didn't see the beam falling?

A. No, sir; I didn't.

Q. On the Baltimore trial these questions were asked you and you gave these answers:

"Q. Who was engaged with you cleaning out the bilges? The chief officer and yourself, isn't that right?

"A. Why, at times he would come over to help me; yes.

"Q. And you saw this thing fall, didn't you?

"A. I saw it, yes."

Don't you remember testifying on that important question in that way?

A. No, sir.

Q. That you actually saw it?

Mr. TREACY. Objected to as to form.

The COURT. Strike out "on that important question."

Q. Didn't you so testify in Baltimore, that you saw it falling?

A. I don't remember; no, sir.

Q. You don't remember?

A. No, sir; I do not. It was all done just like that [snapping his fingers].

Q. I know that, but you have given testimony. I am asking if you recollect this testimony:

"Q. And you saw this thing fall, didn't you?

"A. I saw it, yes."

Do you remember giving that testimony, actually testifying that you saw it coming down?

A. No, sir; I do not.

Q. That has all faded away from your mind; do you claim you simply don't remember it?

Objected to as to form.

Objection sustained.

Exception.

133 By the COURT:

Q. You testified in a suit involving this accident, in Baltimore, did you not?

A. Yes.

Q. Do you remember what you testified then?

A. I do not; no, sir.

By Mr. HILTON:

Q. You were under oath in that trial, weren't you?

A. Yes, sir.

Q. When the beam fell did anything break; did the sling or anything break, that you could see?

A. No, sir; I don't think it did.

Q. Did you know the captain before you went on the ship?

A. No, sir.

Q. You knew Captain Stayton, of the Baltimore Steamship Company, didn't you?

A. Yes.

Q. What position did he hold with the Baltimore Steamship Company?

A. He was president of the Baltimore Steamship Company.

Q. Was he from Smyrna?

A. Yes.

Q. Your little town?

A. Yes.

Q. And you were on one of his ships?

A. Yes, sir.

EDWARD S. HODGSKIN, being duly sworn and examined as a witness for the plaintiff, testifies:

By Mr. TREACY:

Q. You are a physician and surgeon, duly licensed to practice in the State?

A. I am.

134 Q. How long have you been in practice?

A. Over thirty years.

Q. Where are your offices?

A. 522 Second Street, Brooklyn.

Q. A few days ago did you examine Vernon Philipps, this young man?

A. I did.

Q. That was at my request?

A. It was.

Q. And at my office?

A. It was.

Q. And it was for the purpose of giving testimony at this trial?

A. It was.

Q. Will you tell us what you found?

A. The boy undressed except for his—down below his knees. I saw that the left thigh had been amputated at about the junction of the middle and lower third; that is, about 6 to 8 inches. That thigh bone had been taken off with all the tissues underneath it. There is a very large surgical scar in the stump. All the tissues of the stump are atrophied or flabby from disuse. In manipulating the stump around the scar, particularly the side back of the scar is thickened and there is evidence of pain and complaint of pain. In manipulating the stump so that you can feel the movement of the left hip joint there is a distinct grating sound due to roughening of the joint surface, which is the result following an inflammation in the left hip joint.

By the COURT:

Q. An inflammation that is now present?

A. No; it is the result of inflammation. It is the old crepitation or rubbing together of the joint surface which has been roughened up by inflammation.

By Mr. TREACY:

Q. Did you examine him further?

135 A. In the examination for the subjective symptoms of pain I found on deep pressure over the crest of the pelvis bone, that is, at the lower part of the back, evidence of pain on the left side; right where the muscles that support the back set into the pelvis there are distinct evidences of pain on pressure in that region.

Q. Is there anything as to the condition of the pelvis that you observed objectively?

A. No, sir.

Q. Have you described in detail everything that your examination disclosed?

A. Yes.

No cross-examination.

JOHN J. LAPOINT, being duly sworn and examined as a witness for the plaintiff, testifies:

By Mr. TREACY:

Q. Where do you live?

A. In Baltimore, Maryland.

Q. Do you work there now?

A. Yes, sir.

Q. In July, 1921, were you on the steamship "West Cape"?

A. I was.

Q. In what capacity?

A. Third officer.

Q. Up to that time how long had you been following the sea?

A. About nine and a half years.

Q. Who were the officers on this ship?

A. The deck officers?

Q. The master was who?

A. Baker; C. A. Baker; Clarke was the first officer; I don't remember his first name. Tall was the second officer and I the third.

136 Q. You were on the ship when it left Baltimore and went to Norfolk and then on over to Glasgow, Swansea and Limerick?

A. Yes; from the 28th of May till July 28th.

Q. What sort of a cargo did you go over with?

A. Grain in 1 and 5 holds and coal in 2 and 4.

Q. Where did you finally unload the last of your cargo, your last port?

A. The coal, in Limerick, Ireland.

Q. As 1 and 5 were fitted up to carry grain will you describe how the holds were fitted with shifting boards?

A. Burlap was laid on the floor of the hold to stop the grain from seeping through the cracks from the flooring into the bilges, so that the grain would not get into the scuppers, so that we could not get the water out. The shifting boards were laid fore and aft of the ship in the hold.

Q. It was simply a board partition?

A. That is just what it is. Sometimes they put it in in bulk and leave it in the bags so high on top as to act instead of shifting boards.

Q. But in these holds the shifting board were used?

A. The shifting boards were used.

Q. Were those shifting boards left in when the grain was discharged at Limerick?

A. Yes; the grain was not discharged in Limerick, though.

Q. Where was it discharged?

A. In Glasgow or in Swansea.

Q. At any rate, these shifting boards or partitions were left in?

A. Yes.

Q. Do you remember leaving Limerick?

A. Yes.

Q. Did you come home with cargo or ballast?

A. Just the ballast.

Q. What ballast did you have?

A. Water in 1 and 5.

Q. In No. 1 hold and No. 5 hold?

A. Yes; the extreme ends of the ship or the extreme cargo space.

137 Q. In a general way, will you describe to the jury what these holds are?

A. Well, they are—it is the inside of the ship; the lower hold comes up, and then there is a between deck; and that also has beams across the square of the hatch where the cargo goes down, and then it spreads out; but the hold itself is much smaller than the hold is at the bottom.

Q. The hatch opening is smaller?

A. Yes; in the bottom of the hold the hold is much larger. It is the whole width of the ship, and the whole length of the hold.

Q. About how large are these hatch openings?

A. No. 1 hold was probably 24 feet; maybe it was 22 by 24, or something like that; I won't say that is right. I know it is not right.

Q. In these hatch openings are there certain beams leading athwartships?

A. Yes.

Q. What do you call them?

A. You call them a beam or a strongback. Some use one term and some the other.

Q. What are the dimensions of the strongbacks?

A. They are the width of the hatch opening.

Q. About how deep are they?

A. That depends on the coamings; but these were about 15 inches deep.

Q. Confine your description to No. 1 hold; how many strongbacks were there in each opening?

A. About five in each.

Q. And over the strongbacks lay the boards or hatches?

A. Yes, sir.

Q. And they are pieces of wood from beam to beam?

A. They are oblong shaped pieces of wood with handles that lift off, and they are laid right across from one beam to the other.

Q. They are fore and aft?

138 A. They are fore and aft, yes; you start at one side and put them across.

Q. How long are they and how wide?

A. They vary very much, even in that hatch. The after ones were much shorter than any other of the sections; probably the average of them would be—if there were five and the hold was 24 feet long or wide, there would be enough to make five—probably five or six feet long each, each section.

Q. Do you remember at sometime during the voyage after you left Limerick and were on your way home, that something was done about removing the water ballast?

A. Yes.

Q. Tell us about that.

A. We got into very rough weather, and, figuring that we had to take some of the water out of the ship to have her ride a little easier, we sent word down to the engineers to pump some of the water out. They made an attempt to do so, and they discovered that the pumps did work for a little while but in working they sucked the grain into the pipes and blocked it up and rendered the pumps useless.

Q. That is, the hold had never been made clean?

A. The hold had not been made ready for sea in Limerick.

Q. What should have been done?

A. Thoroughly clean the limbers and the pumps of all dirt and take down all the shifting boards and hoist them out of the hold or lash them in the between decks or lash them on one side of the hold were they would not move.

Q. Whose duty was that?

A. The chief officer's.

Q. That was the first mate's job?

A. Yes.

Q. And that was not done?

A. No, sir.

Q. What happened after the engineers found that the water would not draw through the pumps?

139 A. They tried siphoning and bailing it out with buckets and all kinds of schemes, and eventually they ended up by cutting a hole in the bulkhead of No. 2; the bulkhead is the steel partition between one hold and the next hold, and by cutting a hole in the bulkhead the water ran from No. 1 to No. 2 and the pipes and bilges being clear where the coal was in No. 2, they could pump it from No. 2 over the side.

Q. And that was done?

A. That was done.

Q. After that was done it left No. 1 hold free of water?

A. Not all free because this hole was made a little higher than the floor.

Q. You could get down in No. 1; is that correct?

A. Yes.

Q. Could you get that little surplus of water out finally?

A. They got the rest out with buckets?

Q. What was the condition of the hold then?

A. The rolling of the ship back and forth from the water in the hold had knocked down the shifting boards and made splinters out of them and while the water was in the hold this débris floated on the top; but in rolling back and forth it got into the side of the ship; some of the pieces got stuck in the skin of the ship and others laid in heaps here and there and everywhere.

Q. And that was the way it laid when the water was finally taken out?

A. Yes; then they started to clean the hold in the waterway.

Q. What day was that?

A. I believe it was started on a Saturday afternoon.

Q. July 23, 1921?

A. Yes.

Q. And it continued on till Sunday?

A. Yes; they turned the men to again after breakfast on Sunday morning.

140 Q. Where were you at that time?

A. On the bridge.

Q. Were you on watch?

A. Yes, sir.

Q. What were you doing?

A. Taking observations and working out the longitude, or other duty; keeping lookout.

Q. Was Captain Baker there?

A. Not just then.

Q. Did you see him afterwards?

A. Yes.

Q. Did you see this work going on?

A. From the bridge, at that time.

Q. Was it forward of where you stood on the bridge?

A. Yes.

Q. And you could see it?

A. Yes; that is, I could see the top of the hatch and the derrick.

Q. How was the work being done on the main deck? By a winch or anything of that kind?

A. Yes, sir; a winch and derrick and wire fall.

Q. Where was the winch?

A. On the port side of the after corner of the No. 1 hatch.

Q. Was it a steam winch?
A. Yes.
Q. And the wire cable ran around the drum of the winch?
A. The barrel.
Q. And ran to a block at the foot of the boom?
A. A block at the heel and at the head of the boom.
Q. And continued on down into No. 1 hold?
A. Yes.
Q. Who was running the winch?
A. Mr. Tall, the second officer.
Q. Was there any signal from Tall at that time?
A. Not at that time.
Q. Do you know where the first officer was, Mr. Clarke?
A. Down in the hold.
Q. Did you get any orders from Captain Baker then?
A. He came up on the bridge about 9.30 or probably before that, but it was between 9 and 10 o'clock.
141 Q. From where you stood on the bridge could you see whether the entire hatch on the main deck was open?
A. Yes, I could see.
Q. Well, was it or not?
A. One section of hatches and one beam was off.
Q. You are speaking of the main deck?
A. Yes, what I could see from the bridge.
Q. What about the between decks? You couldn't see that?
A. Not then.
Q. Did Captain Baker say anything to you?
A. Yes.
Q. Tell us what Captain Baker said to you on the bridge on that occasion?
Objected to as incompetent.
Objection overruled.
Exception.
A. "Mr. Lapoint, for God's sake, go down on that main deck. Somebody is going to get hurt."
Q. Did he say anything about what you were to do?
A. Yes, to stand at the coaming and signal the winch and kind of steady the drafts when they got clear of the hold.
Q. The ship was at sea at that time?
A. About 350 to 375 miles east of the Capes, yes—Cape Henry and Cape Charles.
Q. Was there any sea on?
A. There was a beam sea; not extra rough; probably 15 to 20 degrees of ship's rolling. It was not what you would call real rough; just a beam sea.
Q. Well, it made the ship roll?
A. Yes.

Q. Did you see how Mr. Tall was winding this winch?

A. Yes.

Q. Well, describe what went on.

A. Mr. Tall insisted on looking through two hatches of the
142 after section, which was shorter ones; there was a crack and he was trying to look at the work going on down through these hatches, and somebody would holler to heave away in the hold, and he had been doing that all the morning, and then he would turn the steam on and whip the winch. When it got half way up he would draw the whip.

Q. The whip is the wire fall?

A. Yes; that is another term for it.

Q. He would watch that and would watch his drafts swing and when he thought it was all right——

A. He would give it the steam quick and let it get clear of the coaming, let the thing roll over till it rolled down between the coaming and the side of the main deck and then let it go.

Q. After Captain Baker had ordered you to act as signal man what did you do?

A. I went down there and endeavored to do so.

Q. Where did you stand?

A. On the port side of the coaming, right above where this section of hatches was off.

Q. On the main deck?

A. On the main deck.

Q. You could see Mr. Tall very plainly?

A. Yes.

Q. And he could see you?

A. Well, he was 10 or 12 feet away from me.

Q. Did you give him signals?

A. Yes.

Q. What was the condition of the between deck hatches?

A. One strongback was out.

Q. And the other four were in?

A. One was out at that place; the forward one might have been out, but where this work was going on and where the fall had to come up through there was one out there.

Q. Could you see that there were some in?

A. Yes, there were some in.

143 By the FOREMAN:

Q. I would like to ask the witness a question. On this hatchway, 24 by 22, or whatever its size was, the hatch covers, are they all one piece or are they separate?

A. Oh, no; there are probably forty hatches on that one square, or there may be thirty.

Q. They are small?

A. Yes.

Q. And altogether they will cover this 22 by 24?

A. Yes; and they put them on one after the other.

Q. Are the strongbacks or iron beams laid across the hatches?

A. Yes.

Q. And are there five of them?

A. There are five of them.

Q. And when they are in place they are solid bolted in; are they immovable when they are in place?

A. Not if they are bolted in; but if they are in as they should be, they are solid. They fit into grooves, and after they are in place there is a hole with a bolt that goes through. That is when they are as they should be.

Q. When they are in position they are solid and tight?

A. Yes.

By Mr. TREACY:

Q. When they are properly in position?

A. Yes.

Q. If these strongbacks were bolted in as the foreman has asked you, they would be immovable. You couldn't get them out until you took out the bolts?

A. You would have to take the bolts out to take them out.

Q. You couldn't pull them out with a fall with the bolts bolted in?

A. No; you would not attempt to.

144 Q. And the reason you would not attempt to is that you know it would be impossible to pull them out?

A. Very likely; something else would go first.

Q. The winch or the small falls or beams would break before the strongback came out?

A. Yes.

Q. Go on and tell me everything you saw from the time you started down there and took your position to give signals to Mr. Tall.

A. I will start where the accident occurred.

Q. I want you to precede that. Start where you stepped down from the bridge and tell us about it.

A. I went forward and started to signal Mr. Tall with my hand to heave and to stop; I was standing in the center where I could see the drafts come up, in plain view, and by looking this way he could run that winch very near right, to an inch of just what we wanted. Well, we got along for half an hour or so and then they took a cargo hook down into the hold underneath the strongback in the between-deck and led the hook way to the forepeak. I myself was standing in the center of the hold and couldn't see what the hook was on, but it was led forward into the peak of the boat and also on the port side. Josephs, the boatswain, hollered to heave away. In fact, he came to the square of the hatch to holler to heave away. Immediately Mr. Tall began to heave. There was some slack of this fall between the derrick head and where he had this hooked on. Gradually the fall started to tighten and in doing so the load (?) under the beam or strongback as this wire straightened out, something had

to come. The hook was jammed and it lifted that beam right out of the sockets, very slowly. I could see it as it started to go, and I hollered down in the hold. First I hollered to Mr. Tall and I hollered "stop." When I saw it was to far out I hollered to
145 get out from under down below. Josephs was the only one in the opening of the square and he didn't stop to look up. He just jumped when he heard me holler.

Q. What happened then?

A. This strongback when it lifted out just missed the boatswain.

Q. What happened after it lifted out of the socket?

A. It lifted out and went down in the hold end first. It had to go over this way [illustrating] whenever the heaviest half of the beam was it went down first, over the wire. It went down and hit the section along the square of the hatch and on the bottom of the tank top. On the top of the tanks the boards that should have been on the bottom of the hold were also loosened from the water washing back and forth. That was in the lower hold on top of the tank top. There is a tank top about 14 inches deep in the hold. The beam going down hit the bottom of the hold or the top of the tank and made a dent in it, and bounced and went over to the starboard side of the ship. The between deck comes out on top, where Philipps was on the starboard side in the bilges, above his head. He was not in the opening of the square of the hatch. He was way over to the starboard side of the hold near Mr. Clarke, the first mate, cleaning out the bilges, scooping grain out. He was sitting down, one leg in this way [illustrating], and the piece of board was off here, and this right foot was down inside [illustrating]. This beam, after it bounced, went over with the rolling of the ship and caught him in the foot. I hollered to the chief engineer, who was standing on the bridge deck, to get a tourniquet out of the medicine chest. The captain on the bridge heard me ask for the tourniquet, and he came running down and passed me on the main deck and told me
146 to take the bridge. Then he himself went down in the hold.

Q. How far did the beam fall from where it was in place to the bottom of the hold?

A. About 30 or 35 feet.

Q. What is its weight, about?

A. Oh, probably a ton.

Q. What did you do from that time?

A. I went on the bridge then.

Q. Did you do anything with reference to getting aid?

A. Yes, sir; I got the wireless room and asked him to send out to see if there were any ships in the immediate vicinity with a doctor on board. I did this through a speaking tube from the chart room to the wireless room. Just then I looked out at the port side from the bridge and I saw smoke—lots of smoke—and I knew it was a liner, from seeing smoke like that before, and I turned the ship around and headed toward the liner, and at the same time I got the engine room and asked for a little more steam, and also told the

wireless operator to get that particular ship, and told him what the trouble was, so that we could have a doctor come from their ship to our ship, and asked them to launch one of their boats, because we didn't have men to handle a boat.

Q. What was done about that?

A. In about twenty minutes to half an hour we were right alongside of each other, and before the ship realiy stopped they had got a boat—started to lower a boat on the British ship—I don't remember her name, and the doctor from the other ship got into a boat, and they lowered him down and put men to row from that ship.

Q. That was the Athenic?

A. I believe so. They sent a surgeon to our ship and he
147 went forward. By this time Captain Baker had got a cot out of the forecastle and put a mattress on it and slung it up himself onto the cargo hook, and one of the engineers ran the winch—I am not sure which one—and lowered him down into the hold. He wanted to test it out, and he went down himself. Of course, there were other things that went on in the hold that I didn't see myself. They are only hearsay. I did see the same winch come up a little later with Captain Baker and Philipps in the one cot and they landed him on deck. Then the doctor looked at him; and I don't know what was going on, but they went back on the liner again.

Q. Could you see Philipps on the main deck?

A. Yes; but the crowd was standing around him holding a piece of awning over him to keep the sun off. I couldn't see through that. The doctor was kneeling down by him, but he got in his boat and went back to the liner to get an anesthetic.

Q. Didn't you have any ether on board?

A. No, sir.

Q. What happened after the doctor went away?

A. He went to his ship and then brought an anesthetic or whatever he went back for, and then he came back and worked on Philipps and it was probably near one o'clock when he went back to his ship and took Philipps with him because their ship was a faster ship than ours and was going to arrive in Norfolk a day ahead of ours, at least. That was a passenger ship.

Q. That was the last you saw of Philipps on the "West Cape"?

A. That was the last I saw of him on the "West Cape."

Q. Will you look at this photograph and tell me whether that is a fair picture of the "West Cape"?

A. Yes, that is very good. You can even see the name on it.
148 Q. Whose duty would it be to see that the strongback was fastened properly?

A. The chief officer is in charge of all the cargo work; of any work, in fact, that is done on board the ship. He is subject to the captain's orders and the second and third mates are subject to his orders and the captain's orders.

Q. But that is in his department?
A. Yes.
Q. And he is in sole charge of that?
A. Yes.
Mr. TRACY. I offer in evidence the photograph.
It is marked "Plaintiff's Exhibit K."
Q. None of these strongbacks were bolted, were they?
A. No.
Q. Not any of them?
A. No.
Q. This day of the accident was Sunday, wasn't it?
A. Yes.
Q. That is a day of rest at sea?
A. Yes; except for absolutely necessary things such as steering the ship and lookouts.
Q. But there was not any necessary work to do in connection with these holds?
A. Not that couldn't be postponed till we got inside the Capes.
Q. That could have been done in port?
A. Yes, sir.
Q. And it should have been done in Limerick?
A. Yes.
Q. But it could have been done after you got into port?
A. Yes.
Q. That was the place to do it?
A. Yes.
Q. These hatches should not be opened at sea, anyway, unless an emergency occurs, should they?
Objected to.
149 Q. Has that been your experience?
A. Unless it is absolutely necessary; probably to ventilate the holds, or something like that; for ventilation.

Cross-examination by Mr. HILTON:

Q. Isn't it customary to remove dunnage as you are approaching port; to get the holds clear for receiving cargo when in port?
A. Not when it could be done at the previous port. If you have time to do it at the previous port that is the place to do it; not at sea. In sheltered water is always the place to do any winch work.
Q. You were there giving signals, were you not?
A. Yes.
Q. Who was operating the winch?
A. Mr. Tall, the second mate.
Q. You had removed before this accident several loads of dunnage, had you not?
A. Yes.
Q. There had been no accident or falling strongbacks previous to this one?
A. No, sir.

Q. The different officers are in charge of different hatchways, are they not?

A. No, sir; they are not.

Q. So far as you could see, the winch had been and was working all right, was it not?

A. Yes, sir.

Q. When this dunnage was ready to go up did anybody down below yell that it was ready?

A. Which dunnage?

Q. The one that caught in the strongback.

A. It was not a draft; it was a piece of dunnage that was wedged into the side of the ship up in the forepeak that was jammed that they wanted to pull loose, and the boatswain put a hook around this jammed piece of wood and let it wait there under the beam, and he hollered to heave away and the second officer immediately started to do so.

150 Q. You were there giving signals at the time?

A. He didn't take them down.

Q. Who?

A. The second officer, the winchman.

Q. He didn't take your signals?

A. No; he ignored them half the time.

Q. What signals were you giving?

A. With my hand; the only signal you would give on any ship.

Q. The board caught in the beam, didn't it?

A. Where the hook was?

Q. Yes.

A. No; it was up in the forepeak, jammed in the side of the skin. There were strips of wood that are laid fore and aft all the way up to stop the cargo from getting on the steel of the ship, on the metal, to keep the sweat off the cargo.

Q. When the beam came out was this stick moving up?

A. It was jammed. It never did move.

Q. What caught the beam?

A. The wire fall was under the beam; it led under the beam and then forward; they had the hook on the jammed piece of dunnage.

Q. The beam, was it fastened in with bolts?

A. No.

Q. Were there any bolts on the ship to fasten it with?

A. I don't think so; I don't remember seeing any.

Q. So far as you know, then, the real cause of the accident was the failure to have that bolted in?

A. Not necessarily.

Q. If it had been bolted in it would not have come out?

A. Well, something else probably very nearly as bad would have happened; something would have given.

Q. This beam itself is what dropped?

A. Yes.

Q. And it eventually dropped on the young man's leg?
A. At the second bounce it went over——
Q. This particular beam was not fastened in?
A. No, sir.
151 Q. The one that dropped?
A. No, sir.
Q. Were there any bolts to fasten it in?
A. Not that I know of.
Q. How long had it been unfastened?
A. Ever since I was on the ship; the 18th day of May I went there. I was transferred from the one ship to the "West Cape."
Q. Were the other beams fastened, of that No. 1 hatch?
A. No, sir.
Q. They were not fastened in?
A. They were in their sockets where they belonged.
Q. But were they bolted in?
A. No, sir.
Q. This beam was in the socket but unbolted?
A. Yes.
Q. Do you know about other hatchways on the ship?
A. In what respect?
Q. In reference to whether they were bolted in or not?
A. No, sir, they were not. They did not have no bolts in them. They don't use them: nobody does as a rule.
Q. It isn't customary to bolt them in?
A. You are supposed to for safety's sake but they take time and after a ship has been sailing for years and months they don't fit and it is a lot of worry and trouble to put them in.
Q. Well, then, the bolts on this particular beam, so far as you know, would not fit anyway?
A. I don't know. I never saw any in them.
Q. The beams, therefore, were left unbolted?
A. In their sockets.
Q. And so far as you know there were no bolts to bolt them in?
A. Not as far as I know.
Q. And that was the condition of all the beams on No. 1 hatchway?
A. As far as I know.
Q. And had been for a long time?
A. As far as I know, yes.
152 Q. They had been for that trip?
A. They had been for that trip, yes.
Q. And you never saw any bolts on the ship to fasten them in?
A. Not on that ship.
Q. Not on that trip?
A. No, I didn't see any.
Q. In your opinion if they had been bolted in, that particular strongback would not have come out, would it?
A. No, sir.

Q. If there had been bolts on the ship it would have been bolted n!

A. It might have been bolted in.

Q. The boatswain was Josephs, was he not?

A. Yes, sir.

Q. What part of it did he have charge of?

A. He took his orders from the mate and worked the men accordng to what the chief officer told him. The chief officer was not there, nd if we wanted a man to do something we would call the boatswain nd would relay the order to any of the men.

Q. Where was he at the time of the accident?

A. In the hold.

Q. He did the hooking around the beam?

A. Yes.

Q. Did he give a yell for them to go ahead?

A. He did.

Q. He did that?

A. Yes.

Q. How much experience had he as a boatswain?

A. He had worked as acting boatswain and I don't know whether he ever went to sea before, but his ability as a sailor was nil; nothng.

Q. How long had he been boatswain on this boat?

A. Well, I don't know that; the logbook will give you the correct tatement on that. I believe he was made boatswain either before we got to Swansea or right after. We had a boatswain who had 53 a fight and he had left the ship, and then this boy, Josephs, was made boatswain. He was the biggest man and he was nade boatswain.

Q. Phillips said there were six able seamen on board?

A. Well, that may be right. I would not swear to that. They were signed on A. B.s. Two A. B.s in a watch and ordinary seamen. There were three watches. There would probably be two men in the forecastle, and then the petty officers, the boatswain, and he carpenter.

Q. How many able seamen would that make?

A. Do you mean legitimate able seamen?

Q. Yes.

A. I don't know how about any.

Q. Were any of them rated as able seamen?

A. They were, leaving port. There were some able seamen signed n in Baltimore and deserted the ship in Norfolk, or got off. They ame and went so fast for two days that I couldn't keep track of hem.

Q. You started from Baltimore and went to Norfolk?

A. Yes.

Q. Were there any of the men who deserted at Norfolk?

A. A. B.s? I don't know. They were signed on as such. I know that we had to steer the ship ourselves; the officers had to steer the ship in their own watch.

Q. Not as to A. B.s particularly, but some of the seamen deserted or left at Norfolk, did they?

A. I am sure they did; yes, sir.

Q. Did you get others?

A. We must have got some, but I couldn't say we did. That is all in the logbook, right there, officially.

Q. Was there a strike among the men causing them to leave?

A. Not on board the ship. It wasn't a ship strike. There was a strike on at that time, an engineers' strike and firemen's strike. The sailors were in sympathy with them.

154 Q. Did that cause some of the seamen to leave the ship?

A. Well, the trouble was getting them. We couldn't get them.

Q. It was very hard to get competent seamen under those circumstances for that particular trip?

A. Yes.

Q. You had a boatswain when you left Baltimore; what became of the first boatswain?

Objected to as incompetent, irrelevant, and immaterial.

Mr. HILTON. I want to show how many boatswains they had and the conditions before they had this boatswain.

The COURT. Ask him that question.

Mr. HILTON. I want to prove all the different boatswains.

Objected to.

The COURT. Objection sustained as to what became of the first boatswain unless he remained on the ship.

By the COURT:

Q. Did the first boatswain remain on the ship?

A. It is pretty hard to remember those things.

By Mr. HILTON:

Q. How many boatswains did you have before Josephs was boatswain?

A. One or two; I am not sure which.

Q. He was the third or fourth?

A. No, he wasn't the fourth; he was the third.

Objected to as immaterial.

Q. Where did the second boatswain leave?

A. I couldn't tell you that; I don't know.

155 Q. Do you remember what port the boat was at when Josephs became boatswain?

A. I believe it was Swansea, in Wales.

Q. Was that the next to the last port, Swansea? Then Limerick, and then later to sea?

A. No, sir; Swansea and Glasgow and then Limerick.

Q. I thought you went from Glasgow to Swansea?

A. Well, maybe we did.

Q. Phillips said you did?

A. I don't know for sure. We came home from Limerick.

Q. You went from Swansea to Limerick, didn't you?

A. I don't know. If you say we did, very well. I am not sure. I thought we went to Swansea first and then to Glasgow, but I don't know.

Q. Was there a boatswain by the name of Beckwith?

A. I couldn't tell you that. If he was there he wasn't on there very long.

Q. Well, there was a boatswain that was not on there very long; in other words, the boatswains came and went?

A. Well, we had one that came in the morning of the 18th and left in the afternoon of the 18th. I don't remember his name, either.

Q. How many were there before Josephs became boatswain?

A. I don't know; from the time the officers were signed I believe Josephs was either the second or the third.

Q. At any rate there was some difficulty in getting competent men, was there?

A. Not in Great Britain, there was not; not over there.

Q. The men had left; there was a variable crew apparently. Between Baltimore and Norfolk the crew had left, or part of them, during the strike on shore?

A. Yes; some of them did leave; the real able seamen did leave. They had all ordinary seamen, green ones, to work with, and that was the reason they left.

156 Q. You didn't in any way signal that this board should not be pulled up, did you?

A. The draft that was jammed?

Q. Yes.

A. I did. I signalled to stop and I hollered "Stop." You can't look at a winchman and look in the hold. You signal him with your hand and keep your eyes on whatever is going on. I signal and they continue to lift and I hollered to stop and he turned the steam on full; not full, but faster.

Q. At the moment you yelled?

A. He probably didn't do it because I yelled, but probably the winch went faster because the beam gave and there was less resistance on the winch. I would not say that it went faster because I hollered, because I don't know what was in the man's mind.

Q. What is your employment at present?

A. Chauffeur. I drive a car for four hours a day for a man in Baltimore, and then I work for a dealer in used cars and also as an automobile mechanic.

Q. Who is in charge on a ship, of the general loading and unloading of the ship?

A. The chief officer. The captain is the master of the ship and the chief officer is in charge of the loading.

Q. Who is immediately in charge of the loading or unloading of any particular hatch?

A. Whoever is in charge; but the chief officer is responsible. If he puts me over a hold where work is being done, I am not responsible; he is. I only answer to him, but he answers for the ship to the company or to the charterer. He is responsible. If he has faith enough in me to tell me to do this for him, that is his affair.

Q. Were you in charge at this particular hold?

A. Absolutely not.

Q. The chief officer was?

157 He should have been. He was in charge of the men and their work, and he should have been supervising it.

Q. Before you started to take out dunnage were certain strongbacks taken out?

A. They were taken out Saturday.

Q. Who took those out?

A. I don't know. I wasn't there. I was in my room when that was going on, off watch.

Q. You knew, did you not, all the time for the hour preceding the accident, you knew that those strong backs were unfastened?

A. Yes; I knew it.

Q. You always knew that?

A. Yes.

Q. And you knew that there were no bolts to fasten them?

A. Yes; but I didn't know how they were doing that work. There is a way of doing that work where you would not have to fasten them.

Plaintiff rests.

Adjourned till to-morrow morning, October 7, 1924, at 10.30 a. m.

Colloquy between court and counsel

BROOKLYN, *October 7, 1924.*

Met pursuant to adjournment; present as before.

Mr. HILTON. I move to dismiss the complaint on the ground that the plaintiff has failed to prove facts sufficient to constitute a cause of action; that he has failed to prove the allegations set forth in his complaint; that he has failed to prove negligence as against the United States Emergency Fleet Corporation, on behalf of which this motion is being made. I also make the same motion on behalf of the other defendant, the Baltimore Steamship Company.

158 The COURT. Each motion is denied.

Mr. HILTON. I except for both defendants.

Mr. HILTON. Under the affirmative defense set up in this action of a former adjudication I offer in evidence the docket entries entered in the District Court of the United States for the District of Maryland, these docket entries being certified by the clerk of the said District Court.

Mr. TREACY. I object as incompetent, irrelevant, and immaterial, first; and secondly, which I should like more strongly put, is this: That this defense and this question of law was passed upon by stipulation entered into by the plaintiff and the Baltimore Steamship Company, as follows:

"It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that the separate affirmative defense contained in the 15th paragraph of the defendants' answer wherein the defendants set up the plea of res adjudicata shall be argued and settled by the court before the said case is tried," and so on. That stipulation was prepared by the defendants' attorney and was submitted to me and was consented to by both attorneys. In accordance with the stipulation the entire matter was submitted to Judge Inch, sitting in the trial term as a district judge in this court, and he passed upon it, and he passed upon it finally so far as the trial of this cause is concerned. It seems to me that to ask your honor now to repass upon this settled question, settled by order of Judge Inch, is to ask your honor to sit as a tribunal, to ask one district judge to pass upon the order and determination of another district judge. The only tribunal that may hear this question now is the Circuit Court of Appeals. I make my objection to any offers in evidence in that matter.

159 The COURT. Will you give the court the benefit of your opinion, Mr. Hilton, with respect to the reading of that stipulation?

Mr. HILTON. Yes. I think the purpose of that stipulation was an endeavor on that point to bring it before the court and if possible dispose of it; but not to the extent that an interlocutory decree which was not appealable should preclude the rights of the defendants here, which are all-important in this litigation, to present the record on the trial. I do not see how the stipulation could in any way waive the rights of the defendants.

The COURT. What does the word "settled" mean as used in the stipulation? I am in difficulty to attach any other meaning than that you two gentlemen by your own stipulation have taken from the court this matter. I shall have to so rule and you may have your exception, Mr. Hilton.

Major DREYER. When this matter came up and this defense had been set up we did not have at the time correctly certified copies of the proceedings of the court below so for the purpose of getting the matter before the court and so as to have the benefit of attested signatures we entered into a stipulation that the judge should hear this matter and could use these papers. That was the principal idea.

The COURT. What is to be settled by the court?

Major DREYER. The main idea was that he would not object to our using those papers, and this stipulation was therefore drawn up at that time.

The COURT. I can only go by the original stipulation and I fear I shall have to sustain the objection so long as there are no disputed facts. Was this stipulation made between the parties as Mr. Treacy has stated?

Major DREYER. Yes.

160 The COURT. That appears on page 4 of the transcript of record and the clerk may mark that page in evidence so that the stipulation may appear as a part of the case now.

Major DREYER. I want to add that the case was argued on the motion to dismiss on the ground of res adjudicata and it was dismissed. Subsequently Mr. Treacy moved for a reargument of the case and the case was then, over our objection, reargued and Judge Inch reversed the decision. We could not appeal from that decision. So now he has refused to dismiss and give a judgment on the pleadings, and we are up for trial and we have an affirmative defense that we have got to prove and for that reason Mr. Hilton is now offering that testimony. If your honor will take the first opinion which was rendered by Judge Inch, and which is in this paper, you will see that he says, "for judgment on the pleadings." That is on page 67:

"This is a motion for judgment on the pleadings pursuant to a stipulation signed by the attorneys for all parties and duly filed herein.

"The motion is made by the defendants, and is based by them upon the plea of res judicata set up in defendants' answers."

Then it gives the opinion. He has denied the motion and we are left in the position that he has denied a motion for judgment on the pleadings.

The COURT. Objection sustained, and the two defendants may have exceptions.

Mr. HILTON. I do not see how this stipulation made by Mr. Treacy and Major Dreyer can be deemed to be a final settlement of this plea. The stipulation does not purport to show that it is a final settlement. That on the trial the defense shall be precluded from giving its evidence under the plea or that it shall be such final settlement

161 that this defense under the plea cannot be presented either to this court or perchance to an appellate court, I do not think from reading this stipulation that it can be deemed other than an effort to bring this matter before a coordinate judge of this court. I do not know that the ruling of Judge Inch is any final ruling, or should be, on the part of this court, although it may be argued that there would be a tendency of the court to, so far as it could, sustain a coordinate judge. I do not believe this stipulation should be construed to waive such rights, which are very vital under procedure under the Constitution.

The COURT. It is very difficult for the court to attach any other meaning whatever to the word "settled," as used in that stipulation. When you gentlemen agreed that the matter should be submitted to the court before trial and settled, it seems to me that that settled it.

The objection is sustained and the defendants may each have an exception.

Mr. HILTON. I ask that the document offered in evidence be marked for identification.

The COURT. It is so ordered.

The paper is marked Defendants' Exhibit 1 for Identification.

Mr. HILTON. I will offer in evidence a decree captioned "A Final Decree of the District Court of the United States for the District of Maryland in the action "——

Mr. TREACY. I do not think that these documents should be read, and I object.

Objection sustained.

Mr. HILTON. I ask that this decree be marked for identification and except to your honor's exclusion in evidence.

162 The COURT. It may be marked for identification.

It is marked Defendants' Exhibit 2 for Identification.

Mr. HILTON. I offer in evidence the libel and complaint in the action in the United States District Court for the District of Maryland.

Same objection.

The COURT. Are these all offered under what has been described as the defense contained in par. 15 of the answer?

Mr. HILTON. Yes, sir.

Objection sustained.

Mr. HILTON. Both defendants except. I ask that this be marked for identification.

It is marked Defendants' Exhibit 3 for Identification.

Mr. HILTON. I offer in evidence a certified copy of the amendment to the libel.

Objected to.

The COURT. That is also under par. 15 of the answer?

Mr. HILTON. Yes.

The COURT. Excluded.

Mr. HILTON. On behalf of both defendants I except.

I ask that this certified copy be marked for identification.

The COURT. It is so ordered.

It is marked Defendants' Exhibit 4 for Identification.

Mr. HILTON. I offer in evidence exception and answer filed in the District Court of the United States for the District of Maryland, certified by the clerk of the United States District Court for that district.

Same objection.

163 The COURT. Does it involve the same question of law as the others?

Mr. HILTON. Yes, your Honor.

The COURT. Excluded.

Mr. HILTON. Both defendants note an exception.

Mr. HILTON. I ask that the document be marked for identification as part of the record.

The COURT. It is so ordered.

It is marked Defendants' Exhibit 5 for identification.

Mr. HILTON. I offer in evidence a certified copy in the action in the District Court of the United States for the District of Maryland of the satisfaction piece of that action.

Same objection.

The COURT. Does that involve the same question of law?

Mr. HILTON. Yes, sir.

The COURT. Excluded.

Mr. HILTON. Both defendants note an exception, and I ask that it be marked for identification.

The COURT. It is so ordered.

It is marked Defendants' Exhibit 6 for identification.

Mr. HILTON. I offer to prove in evidence through the official stenographer, who is in court, the entire record and stenographic minutes taken in the district court of the United States in Baltimore in the action tried in that court.

Same objection, ruling, and exception on behalf of defendants.

Defendants rest.

Mr. HILTON. I would like, if I may have the privilege before resting, to offer the stenographic minutes in evidence, having offered the proof of the stenographer who took them, who is here
164 in court, in the action which is set forth in the plea in the answer.

Mr. TREACY. I make the same objection, and object further on the ground that they would be in no event evidence of anything; that the only proper evidence would be the reading of the original notes taken by the stenographer to the proceeding.

The COURT. The same question of law, among others, is involved in this objection?

Mr. TREACY. I assume that it is.

Objection sustained.

Mr. HILTON. Both defendants respectfully except to your Honor's ruling, and I ask that the minutes be marked for identification.

The COURT. They may be marked.

The minutes are marked Defendants' Exhibit 7 for identification.

Mr. HILTON. Both defendants have rested.

Mr. TREACY. May I be sure that we have this stipulation marked as directed?

The COURT. I have directed that it be marked in evidence.

Mr. TREACY. It is very important that it should be marked.

The COURT. Yes; it may be marked.

The COURT. The court directed that to be marked in evidence after the counsel had stated that the stipulation consisted of what was read by the parties, and that this was a correct copy of the stipulation. If you desire to have the original, we will suspend and get the original.

Mr. HILTON. It is a correct copy. I wish to note on the record an objection, and an exception also, to the stipulation going in evidence as no part of the record, I think, under the plea in the answer of the two defendants.

165 The COURT. No objection is made to this paper being marked in evidence because it is a copy of the original stipulation?

Mr. HILTON. No; your honor; the copy is correct: My objection would go even to the original, which is exactly the same as this.

The COURT. Objection overruled.

Mr. HILTON. Both defendants note an exception.

The paper is marked "Plaintiff's Exhibit L."

Mr. HILTON. I renew the motions made at the end of the plaintiff's case on the grounds stated at that time. This motion at this time is made on behalf of the defendant United States Shipping Board Emergency Fleet Corporation to dismiss the complaint on the ground that the plaintiff has failed to prove facts sufficient to constitute a cause of action; that he has failed to prove the allegations set forth in his complaint; that he has failed to prove negligence as against the United States Emergency Fleet Corporation.

I also make the motion in behalf of the other defendant, the Baltimore Steamship Company, on the same grounds.

The COURT. Each motion is denied.

Mr. HILTON. Both defendants note an exception.

Testimony closed.

The defendants sum up to the jury.

The plaintiff sums up the jury.

166 BROOKLYN, *October 7, 1924.*

Charge to Jury

GARVIN, J.: Mr. Foreman and gentlemen of the jury: The plaintiff, Vernon L. Philipps, at the time that this action was begun, was under twenty-one years of age, and brought suit by his guardian, as the law provides, to recover against the Baltimore Steamship Company and the United States Emergency Fleet Corporation, for damages sustained by him as the result of an accident, the particulars of which you have heard described.

The plaintiff has brought suit against these two defendants, claiming that each defendant owned or leased a certain steamship known as the "West Cape," or operated or controlled that boat.

If you find from the testimony, including the exhibits and the various papers that were submitted to you, that the plaintiff has fairly proved that one of these conditions existed with respect to

both of these defendants, then if you find that he is entitled to recover you may award that recovery against both defendants. If you find that only one of them is liable (having in mind all these allegations, the ownership, leasing, controlling, or operation by the two defendants), as to either one or more of these things, you may render a verdict against that defendant. If you find that both of these defendants is either owner, lessor, controller, or operator and that the plaintiff is entitled to a recovery under the rules of law presently to be explained, then it will be your duty to include both of the defendants in the recovery.

167 The theory upon which the plaintiff asks an award at your hands is that he, a member of the crew of the ship in question, while obeying the orders of his superior, was injured in a manner that has crippled him for life. Sometimes a jury is confronted with the difficulty of determining whether or not an accident occured, as claimed by the plaintiff. There is no difficulty in determining that an accident occurred here. Sometimes a jury is confronted with the difficulty of determining whether injuries are permanent. There is no such difficulty here. The physical condition of the plaintiff as disclosed by his appearance is more eloquent than language would be with respect to the permanency of his injuries. So you will have no difficulty in determining that an accident occurred and that the plaintiff was injured and that his injuries were serious and are permanent.

Now you must determine whether or not the defendants, or either of them, is responsible for the accident by reason of the negligence of one of their employes. Both defendants are corporations, so they must act through their agents, and if you find that an employe or representative of the defendants in the operation of the boat conducted himself in a negligent manner so that, as a result, the plaintiff received this grievous injury by reason of the falling of the strongback, as has been described to you, then you will find that the plaintiff is entitled to recover such damages as the circumstances justify as disclosed by the evidence, unless you find at the same time that the plaintiff was conducting himself negligently at the time, and that his negligence caused the injury.

You must scrutinize this testimony and ascertain whether you can find anything in the conduct of the plaintiff that you can

168 fairly say was negligence; and if you find no negligence on the part of the defendants who were operating and controlling the operation of the winch with the block and fall at the time that the hook on which the winch or other part of the apparatus caught the strongback and lifted it from its lashings and caused it to be precipitated into the hold and injure the plaintiff, then your verdict will be for the defendants. But if you find that the accident was the result of carelessness on the part of the defendants in the operation, you will be justified in rendering a verdict in favor of the plaintiff.

The defendants set up as defences certain allegations which are disposed of by the court as questions of law, and with which you need give yourselves no concern; except that the defendants allege that the "West Cape" was in all respects seaworthy, and that if any injury was incurred by the plaintiff at the time and place, or on the occasion mentioned in the complaint, such injury was caused in whole or in part, or was contributed to by negligence or want of care on the part of the plaintiff and was due to an open or obvious risk assumed by him in the business in which he was engaged.

The plaintiff must prove by a fair preponderance of evidence the negligence of the defendants. The defendants, if they or either of them claim that the accident was caused by want of care on the part of the plaintiff, must set up, as has been done, that claim, and must prove it by a fair preponderance of evidence.

It is for you to determine whether, without any evidence being offered on behalf of the plaintiff, the evidence as disclosed by the defendants was of a character to justify you in finding affirma-
169 tively that the accident was caused by lack of care on the part of the plaintiff, and unless you can find such to be the case you can disregard that feature of the case and consider whether or not the accident was caused as a result of the negligence of the defendants' representative.

I think a word should be said with respect to the physical condition of the plaintiff. If you come to the conclusion that the plaintiff is entitled to receive a verdict, you must exercise extreme care, and it may be courage to restrain the amount which you will award the plaintiff to that which will fairly compensate him for his loss of earning power, pain, suffering, and the permanent condition that will follow him through his life. You must not allow, what perhaps would be easier, the verdict that you award increased even by a small amount because of a not unnatural feeling of sympathy which might be excited because of the physical condition of the plaintiff.

With this final suggestion for caution, the court leaves the case in your hands, having confidence that you will be just to each party.

Colloquy between court and counsel

The COURT. Are there any exceptions to the charge or any requests to charge?

Mr. HILTON. The defendant, Emergency Fleet Corporation, excepts to all that part of Your Honor's charge where you submit questions of negligence to be decided by the jury as against it; also the Baltimore Steamship Company excepts to that part of the charge where you submit to the jury questions of negligence against it.

The COURT. Do you hold that no negligence has been established on the part of either defendant and that the case should have been dismissed on that ground?

170 Mr. HILTON. I hold that under the pleadings and under the defendants' answer, which places in issue questions of negligence, that from the point of view of these two defendants no question of negligence should be submitted, based on the plea in the answer. I think that under the plea, if I am right, that there is no such issue.

The COURT. I will give each of the defendants an exception. Have the defendants any request?

Mr. HILTON. None.

The COURT. Has the plaintiff any exceptions to the charge?

Mr. TREACY. No exceptions and no requests. But I think I should make this motion for the record, inasmuch as it appears that the plaintiff has attained his majority since this accident: I think it should be Vernon Philipps in the caption.

The COURT. Unless there is objection, it may be so directed.

Mr. HILTON. I do not think Your Honor has covered any question of contributory negligence.

The COURT. I have intended to do so. That is a defence which must be set up and proven by the defendants.

The exhibits are handed to the foreman of the jury.

The marshal is sworn and the jury retire at 12.05 and return at 12.45 with a verdict for the plaintiff, and assess the damages in the sum of $40,000.

Mr. HILTON. I move to set aside the verdict on behalf of the Emergency Fleet Corporation on the ground that there has been no evidence in this case of the operation of the boat by the Emergency Fleet Corporation, on the ground that this verdict is
171 excessive in amount, contrary to law, and on all the grounds specified in that section of the practice act except that of insufficiency of damages. I make the same motion on behalf of the other defendant, the Baltimore Steamship Company, on the same grounds.

The COURT. Motion denied.

Mr. HILTON. Both defendants note an exception. I ask that there be a stay of execution granted in this case against these defendants covering a sufficient time for the perfecting of an appeal and its disposition on appeal.

The COURT. Is it the purpose of the defendants to furnish security on appeal?

Mr. HILTON. I understand we are not required to put up a bond, if, under the section of law, the Attorney General authorizes an appeal.

The COURT. The Court would not consider that. Your motion is granted and a stay of 10 days from date is directed.

Mr. HILTON. I ask for a little longer stay than that.

The COURT. I will give you 20 days from to-day, and you may renew your application.

Mr. TREACY. I think that stay should not go to the Baltimore Steamship Company.

The COURT. I think it should.

The jury is discharged.

172 In Supreme Court of New York

[Title omitted.]

Notice to produce certain papers

SIRS: Please take notice that the plaintiff demands that you produce upon trial of the above entitled action:

I. All contracts and agreements made between the defendant, known as the United States Shipping Board Emergency Fleet Corporation and the defendant, Baltimore Steamship Company, with reference to the steamship "West Cape" during the year 1921 and particularly the period covering July 24, 1921.

II. All contracts and agreements in writing made by the defendant, United States Shipping Board Emergency Fleet Corpora-
173 tion, with any and all persons and corporations in any wise relating to the steamship "West Cape."

III. The pay rolls, duplicate pay rolls, pay vouchers, pay receipts, pay records, pay checks, pay check vouchers, orders in writing in any way relating to, connected with or concerning the steamship "West Cape" during the year 1921 and particularly covering the period of July 24, 1921.

IV. All contracts and agreements and all copies of contracts and agreements for the insuring, repairing, operating, maintaining, equipping, supplying, painting, rigging, and storing of the steamship "West Cape" made by the defendants during the year 1921 and covering in particular July 24, 1921.

V. A certain voucher check Number 5580 made by the defendants, or either of them, covering wages to plaintiff from May 19, 1921, to July 24, 1921, in the amount of $116.22.

VI. A certain subvoucher supporting pay roll from May 18, 1921, to July 28, 1921, for wages to the plaintiff in the amount of $116.22, issued by the defendants or either of them, and

Please take further notice that in case of your failure to produce same, secondary evidence of the contents thereof will be adduced by the plaintiff upon the trial of this action.

Dated, New York, December 31, 1923.

EDGAR J. TREACY,
Attorney for Plaintiff.

No. 15 Park Row, Borough of Manhattan, City of New York.

174 To Ralph C. Greene, U. S. Attorney, attorney for defendant, United States Shipping Board, Emergency Fleet Corporation; Edgar G. Wandless, of counsel, No. 45 Broadway, Borough of Manhattan, City of New York.

Nathan A. Smyth, attorney for defendant, Baltimore S. S. Co., No. 45 Broadway, Borough of Manhattan, City of New York.

175 *Plaintiff's Exhibit B, in evidence*

United States Shipping Board Emergency Fleet Corporation, Division of Operations

Subvoucher

S. S. West Cape. Voy. 54. Classification, D. (D & E). —— (Steward).

Supporting pay roll from 5/18, 1921, to 7/28, 1921.

Number as on articles, ——. Name, V. L. Phillips. Passport number, ——. Nationality, U. S. Rating, A. B.

Period (inclusive): From 5/18/21 to 7/24/21. Time: 2 months, 7 days. Wages for month, 72.50.

	Credits					Debits, amount
	Hours	Rate	Days	Rate	Amount	
Wages			2 mos. 7	72.50	161.92	Alien 8% tax .....
Overtime						Advances .....
Meal allowance						Slop account .....
Room allowance						Allotments .....
					161.92	.....

Chief: Officer—Engineer—Steward.

Payee.

(Signed in presence of above officer)

I certify that the above account is true and correct and that payment for same has not been received.

Payee.

RECAPITULATION

Total credits	161.92
Total debits	45.70
Less fines	------
Balance due	116.22

I certify that this subvoucher is true and correct; that it appears from the records of my office that the person named hereon was appointed or employed, and has performed the services for the period as stated above; that the person whose name appears on this subvoucher is entitled to the amount of pay stated above for him.

Master.

Port of ——, 192

I hereby certify that —— has this day been paid in full before me, in accordance with the above subvoucher.

Deputy United States Shipping Commissioner.

This voucher is not transferable—No alterations allowed

176 *Plaintiff's Exhibit C, in evidence*

United States Shipping Board Emergency Fleet Corporation, Division of Operations

Subvoucher

S. S. West Cape. Voy. 34. Classification, D. (D & E). —— (Steward).

Supporting pay roll from 5/18, 1921, to 7/28, 1921.

Number as on articles, ——. Name, V. L. Phillips. Passport number, ——. Nationality, U. S. Rating, A. B.

Period (inclusive): From 5/18/21 to 7/24/21. Time: 2 months, 7 days. Wages per month, 72.50.

	Credits					Debits amount
	Hours	Rate	Days	Rate	Amount	
Wages			2 mo. 7	72.50	161.92	Alien 8% tax
Overtime						Advances
Meal allowance						Slop account
Room allowance						Allotments
					161.92	

Chief Officer—Engineer—Steward.

Payee.

(Signed in presence of above officer)

I certify that the above account is true and correct and that payment for same has not been received.

Payee.

RECAPITULATION

Total credits	161.92
Total debits	45.70
Less fines	
Balance due	161.22

I certify that this subvoucher is true and correct; that it appears from the records of my office that the person named hereon was appointed or employed, and has performed the services for the period as stated above; that the person whose name appears on this subvoucher is entitled to the amount of pay stated above for him.

Master.

Port of ——, 192

I hereby certify that —— has this day been paid in full before me, in accordance with the above subvoucher.

Deputy United States Shipping Commissioner.

This voucher is not transferable—No alterations allowed

177 *Plaintiff's Exhibit D, in evidence*

United States Shipping Board Emergency Fleet Corporation,
Division of Operations

Sub-Voucher

S. S. West Cape. Voy. 54. Classification D. (D & E). — (Steward).

Supporting pay roll from 5/18, 1921, to 7/28, 1921.

Number as on articles, ——. Name, V. L. Phillips. Passport number, ——. Nationality, U. S. Rating, A. B.

Period (inclusive): From 5–18–21 to 7–24–21. Time: 2 months 7 days. Wages for month, 72.50.

	Credits					Debits, amount	
	Hours	Rate	Days	Rate	Amount		
Wages			2 mo. 7	72.50	161.92	Alien 8% tax	
Overtime						Advances	
Meal allowance						Slop account	
Room allowance						Allotments	
					161.92		

RECAPITULATION

Total credits	$161.92
Total debits	45.70
Less fines	
Balance due	116.22

Chief Officer—Engineer—Steward.

Payee.

(Signed in presence of above officer)

I certify that the above account is true and correct and that payment for same has not been received.

Payee.

I certify that this subvoucher is true and correct; that it appears from the records of my office that the person named hereon was appointed or employed, and has performed the services for the period as stated above; that the person whose name appears on this subvoucher is entitled to the amount of pay stated above for him.

Master.

Port of ——, 192

I hereby certify that —— has this day been paid in full before me, in accordance with the above subvoucher.

Deputy United States Shipping Commissioner

This voucher is not transferable—No alterations allowed

178 *Plaintiff's Exhibit E, in evidence*

Baltimore Steamship Co., Inc., steamship agents and operators, Lexington Building. Regular line services: Baltimore-Glasgow; Baltimore-Avonmouth; Baltimore-West Indies. Sailings to other ports upon application.

BALTIMORE, MD., *August 16, 1921.*

Mr. V. L. PHILLIPS,
Public Health Service Hospital,
Sewells Point, Norfolk, Va.

Subject: Wages—SS. "West Cape."

DEAR SIR: We are attaching hereto check made payable to you for wages due aboard SS. "West Cape" from May 18th, 1921, to July 24th, 1921, together with three copies of subvoucher which you will please sign in triplicate and return to this office as soon as possible.

Yours very truly,

THE BALTIMORE STEAMSHIP CO., INC.
W. D. PRITCHARD, *Treasurer.*
By WM. E. CLARK.

This voucher is not transferable—No alternations allowed

179 *Plaintiff's Exhibit F, in evidence*

Baltimore Steamship Co., Inc., steamship agents and operators, Lexington Building. Regular line services: Baltimore-Glasgow; Baltimore-Avonmouth; Baltimore-West Indies. Sailings to other ports upon application

BALTIMORE, MD., *October 29th, 1921.*

Mr. V. L. PHILLIPS,
U. S. Public Health Service Hospital, Number 29,
Sewalls Point, Norfolk, Va.

DEAR SIR: Under date of August 6th, 1921, we sent you our voucher check #5580, covering wages from 5/18/21 to 7/24/21, in the amount of $116.22, for which we have never received receipted pay voucher to cover.

If you will please be so kind as to receipt the enclosed pay voucher, in triplicate, in order that we may include same in the steamer's account, you will very much oblige,

Yours very truly,

BALTIMORE STEAMSHIP COMPANY, INC.
W. D. PRICHARD, *Treasurer.*
By R.K.

WFN:RK

180 *Plaintiff's Exhibit G, in evidence*

General comptroller's department, division of operations, United States Shipping Board Emergency Fleet Corporation

Subvoucher

S. S. West Cape. Voy. 54. Classification D. (D & E.) —— (steward).

Supporting pay roll from 5/18, 1921, to 7/28, 1921.

Number as on articles, ——. Name, V. L. Phillips. Passport number, ——. Nationality, ——. Rating, A. B.

Period (inclusive): From 5/18 to 7/24. Time: 2 months 7 days. Wages for month, $72.50.

	Credits					Debits, amount	
	Hours	Rate	Days	Rate	Amount		
Wages			(2 mos. 7 days.	72.50 a mo.	161.92	Alien 8% tax	.....
Overtime						Advances	25.8
Meal allowance						Slop account	19.8
Room allowance						Allotments	.....
					161.92		45.7

RECAPITULATION

Total credits	$161.92
Total debits	45.70

Less fines	-------
Balance due	116.22

Chief: Officer—Engineer—Steward.

Payee.
(Signed in presence of above officer.)

I certify that the above account is true and correct and that payment for same has not been received.

Payee.

I certify that this subvoucher is true and correct; that it appears from the records of my office that the person named hereon was appointed or employed, and has performed the services for the period as stated above; that the person whose name appears on this subvoucher is entitled to the amount of pay stated above for him.

Master.

Port of, 192

I hereby certify that has this day been paid in full before me, in accordance with the above subvoucher.

Deputy United States Shipping Commissioner.

181 *Plaintiff's Exhibit H, in evidence*

General Comptroller's Department, Division of Operations, United States Shipping Board Emergency Fleet Corporation

Subvoucher

S. S. West Cape. Voy. 54. Classification, D. (D & E). — (Steward).

Supporting pay roll from 5/18, 1921, to 7/28, 1921.

Number as on articles, ——. Name, V. L. Phillips. Passport number, —— Nationality, ——. Rating, A. B.

Period (inclusive): From 5/18 to 7/24. Time: 2 months 7 days. Wages for month, 72.50.

	Credits					Debits, amount	
	Hours	Rate	Days	Rate	Amount		
Wages			2 mos. 7 days.	72.50 a mo.	161.92	Alien 8% tax	
Overtime						Advances	25.85
Meal allowance						Slop account	19.85
Room allowance						Allotments	
					161.92		45.70

RECAPITULATION

Total credits	161.92
Total debits	45.70
Less fines	
Balance due	116.22

Chief: Officer—Engineer—Steward.

Payee.

(Signed in presence of above officer)

I certify that the above account is true and correct and that payment for same has not been received.

Payee.

I certify that this subvoucher is true and correct; that it appears from the records of my office that the person named hereon was appointed or employed, and has performed the services for the period as stated above; that the person whose name appears on this subvoucher is entitled to the amount of pay stated above for him.

Master.

Port of ——, 192

I hereby certify that —— has this day been paid in full before me, in accordance with the above subvoucher.

Deputy United States Shipping Commissioner.

This voucher is not transferable—No alterations allowed

182 *Plaintiff's Exhibit I, in evidence*

General Comptroller's Department, Division of Operations, United States Shipping Board Emergency Fleet Corporation

Subvoucher

S. S. West Cape. Voy. 54. Classification, D. (D & E). —— (Steward).

Supporting pay roll from 5/18, 1921, to 7/28, 1921.

Number as on articles, ——. Name, V. L. Phillips. Passport number, ——. Nationality, ——. Rating, A. B.

Period (inclusive): From 5/18 to 7/24. Time: 2 months 7 days. Wages for month, 72.50.

	Credits					Debits, amount	
	Hours	Rate	Days	Rate	Amount		
Wages			2 mos. 7 days.	72.50 a mo.	161.92	Alien 8% tax	
Overtime						Advances	23.6
Meal allowance						Slop account	11.9
Room allowance						Allotments	
					161.92		45.7

RECAPITULATION

Total credits	161.92
Total debits	45.70
Less fines	
Balance due	116.22

Chief: Officer—Engineer—Steward.

Payee.

(Signed in presence of above officer)

I certify that the above account is true and correct and that payment for same has not been received.

Payee.

I certify that this subvoucher is true and correct; that it appears from the records of my office that the person named hereon was appointed or employed, and has performed the services for the period as stated above; that the person whose name appears on this subvoucher is entitled to the amount of pay stated above for him.

Master.

Port of, 192

I hereby certify that has this day been paid in full before me, in accordance with the above subvoucher.

Deputy United States Shipping Commissioner.

This voucher is not transferable—No alterations allowed

183 *Plaintiff's Exhibit J, in Evidence*

Baltimore Steamship Co., Inc., Steamship Agents and Operators, Lexington Building, Regular line services: Baltimore-Glasgow, Baltimore-Avonmouth, Baltimore-West Indies. Sailings to other ports upon application.

BALTIMORE, MD., *November 28th, 1921.*

V. L. PHILLIPS,
U. S. Public Health Service Hospital Number 29,
Sewalls Point, Norfolk, Va.

DEAR SIR: Referring to our various communications, with you, in reference to the attached papers, we would thank you to sign same, and return them to us, or advise us your reason for withholding return of receipts.

In the event that you hold the previous vouchers sent you, it will be in order for you to destroy these, and let us have one receipt, i. e., in triplicate, by return mail, and very much oblige,

Yours very truly,

BALTIMORE STEAMSHIP COMPANY, INC.,
W. D. PRITCHARD, *Treasurer*,

WFN:RK By RK

184 In District Court of the United States for the District of Maryland

No. 900 Admiralty Docket

[Title omitted.]

Exhibit 1 in evidence

Docket entries:

Oct. 20, 1921, Libel in a cause of tort civil and maritime, and order of court authorizing the libellant to sue without prepayment of costs, filed. (Service admitted by U. S. Atty.)

Oct. 20, 1921. Summons issued as to The Baltimore Steamship Company retble. 1st Tuesday in November next. Copy writ sent to be served.

(Summoned the Baltimore Steamship Co., a body corporate by service on T. E. Carson, its general manager and copy of writ, left with him this 20th day of October, 1921.)

Oct. 22, 1921. Affidavit of service of copy of libel on U. S. Atty. and mailing copy to U. S. Atty. Genl. filed.

185 Nov. 29, 1921. App. of Messrs. Daniel O. Hastings and John H. Skeen for the libellant, order filed.

Dec. 29, 1921. App. of George Forbes, Esq., for respondent, order filed.

Oct. 9, 1922. App. of E. Ridgely Simpson, Esq., for libellant struck out, order filed.

Dec. 15, 1922. Exceptions and answer of respondents, filed (service admitted).

Dec. 22, 1922. Petition of libellant to amend libel by adding specifications of negligence to the 3rd paragraph and order of court granting leave as prayed, filed.

Feby. 19, 1923. Decree of court in favor of the libellant for $500.00 for maintenance and cure and that the respondents pay the costs of this proceeding, filed.

Feby. 21, 1923. Opinion of court filed.

Mch. 21, 1923. Decree "Satisfied," "Contented," and "Paid," upon payment of costs by the respondent, order filed.

June 4, 1923. Petition of Vernon L. Phillips, jr., to set aside decree herein and order of court that the defendants or their attorneys show cause on or before the 15th June, 1923, why the decree and

order of satisfaction herein should not be set aside and vacated, provided service of a copy of this order is made on or before 8th June, 1923, filed (service admitted).

June 15, 1923. Answer of respondents to order to show cause why the decree and order of satisfaction herein should not be vacated, filed.

186 UNITED STATES OF AMERICA,
District of Maryland, to wit:

I, Arthur L. Spamer, clerk of the District Court of the United States for the District of Maryland, do hereby certify that the aforegoing is a true copy of the docket entries, taken and copied from the record of proceedings in the therein-entitled matter of Vernon L. Phillips, jr., by Vernon L. Phillips, his next friend, *v.* United States of America, The United States Shipping Board Emergency Fleet Corporation, and the Baltimore Steamship Company, No. 900 Admiralty Docket in said District Court.

In testimony whereof I hereunto set my hand and affix the seal of the said District Court this 2nd day of October, 1924.

[SEAL.] ARTHUR L. SPAMER,
Clerk of said District Court.

187 In District Court of the United States, for the District of Maryland

[Title omitted.]

Exhibit 2 in evidence

Final decree

This cause having come on for hearing, on the pleadings and proofs, and having been argued and submitted, due consideration having been had, it is now this 19th day of February, 1923.

Ordered, adjudged and decreed, by the District Court of the United States for the District of Maryland, that the respondents are not liable to the libellant for full indemnity, but only for maintenance and cure, which is hereby fixed at five hundred dollars, and which the respondents are to pay to the libellant:

And it is further ordered, adjudged and decreed that the respondents pay the costs of this proceeding.

JOHN C. ROSS,
U. S. Circuit Judge.

188 UNITED STATES OF AMERICA,
District of Maryland, to wit:

I, Arthur L. Spamer, Clerk of the District Court of the United States for the District of Maryland, do hereby certify that the foregoing is a true copy of the final decree which was entered and filed on the 19th day of February, 1923, in the therein entitled matter

of Vernon L. Phillips, Jr., by his father and next friend, Vernon L. Phillips v. United States Shipping Board Emergency Fleet Corporation, and Baltimore Steamship Company, Inc., a corporation, No. 900 Admiralty in said District Court.

In testimony whereof I hereunto set my hand and affix the seal of the said District Court, this 2nd day of October, 1924.

[SEAL.] ARTHUR L. SPAMER,
Clerk of said District Court.

189 In the United States District Court for the District of Maryland

[Title omitted.]

Exhibit 3 in evidence

To the Honorable John C. Rose, judge of said court:

The libel and complaint of Vernon L. Phillips, jr., by Vernon L. Phillips, his father and next friend, against the United States of America, The United States Shipping Board Emergency Fleet Corporation, and The Baltimore Steamship Company, a body corporate, in a case of tort, civil and maritime, alleges as follows:

First. That your libelant is an able seamen and shipped aboard the steamship "West Cape," owned and operated by the United States of America, The United States Shipping Board Emer-
190 gency Fleet Corporation, and The Baltimore Steamship Company, a body corporate, at Baltimore, State of Maryland, for a voyage to England and return, at the rate of wages of $72.50 per month, and that he well and faithfully performed his duties until incapacitated as hereinafter set out.

Second. That on or about July 24th, 1921, while the said steamship was at sea, your libelant was standing below decks in No. 1 Lower Hold, engaged in cleaning the bilges when a sling load of dunnage then being hoisted, started and then suddenly caught, causing the cargo whip to lift one end of a hatch beam from its socket, and the other socket failing to hold properly, the said beam dropped striking your libelant on the left ankle and fracturing it.

Third. He alleges that at the time of his injury he was standing in the place required for the work aforesaid, and that the said beam falling suddenly, he was unable to avoid it before it struck him; and he alleges that his injuries were caused by the negligence of the respondents in failing to provide him with a safe place in which to do the work required of him and in failing to use reasonable care to avoid striking him, and to the unseaworthiness and insufficiency of the gear and tackle employed on board said vessel.

Fourth. That as a direct result of his said injuries, gangrene set in, and he was forced to suffer the amputation and loss of his left leg above the ankle and below the knee, and has been confined to a

hospital ever since said injury, undergoing two operations,
191 and being permanently incapacitated as a result of the loss of his said leg and he claims therefor fifteen ($15,000) thousand dollars.

Fifth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore your libellant prays that summons may issue to the marshal of the district aforesaid, commanding him to summon the said respondents, and that they may be required to appear before this honorable court and answer this libel and all and singular the matters aforesaid, and that this honorable court may be pleased to decree in favor of your libellant's claim, with costs, and that he may have such other and further relief as in law and justice he may be entitled to receive.

E. RIDGELY SIMPSON,
Proctor for Libellant.

The libelant elects that this cause shall proceed as an action in rem.

E. RIDGELY SIMPSON,
Proctor for Libelant.

Ordered by the court this 20th day of October, 1921, that the officers of the court shall issue and serve all processes in this cause without the prepayment of costs or the giving of security therefor.

JOHN C. ROSE,
District Judge.

192 UNITED STATES OF AMERICA,
District of Maryland, to wit:

E. Ridgely Simpson, being first duly sworn, deposes and says that the matters and facts set forth in the foregoing libel are true as therein stated to the best of his knowledge, information, and belief.

CHAS. W. ZIMMERMANN,
Chief Deputy Clerk, District Court of the United States for the District of Maryland.

UNITED STATES OF AMERICA,
District of Maryland, to wit:

I, Arthur L. Spamer, clerk of the District Court of the United States for the District of Maryland, do hereby certify that the aforegoing is a true copy of the libel which was entered and filed on the 20th day of October, 1921, in the therein entitled matter of Vernon L. Phillips, jr., by Vernon L. Phillips, his next friend, v. The United States of America, The United States Shipping Board Emergency Fleet Corporation, now or late owners of the steamship "West Cape," and also The Baltimore Steamship Company, a body corporate, operators of said vessel, No. 900 admiralty in said district court.

In testimony whereof I hereunto set my hand and affix the seal of the said district court this 3rd day of October, 1924.

[SEAL.]

ARTHUR L. SPAMER,
Clerk of said District Court.

193 In the United States District Court, for the District of Maryland

[Title omitted.]

Exhibit 4 in evidence

To the Honorable John C. Rose, judge of said court:

First. The respondents having filed on December 16th, exceptions to the libel on the ground of insufficient specifications of negligence, the libelant prays leave to amend by adding the following specifications of negligence to the third paragraph of the libel.

"Libellant alleges that the negligence claimed consists in the failure of the respondent, the United States of America, to provide a cleat or socket of the proper design and sufficient strength to support the strong back when one end of it was negligently knocked
194 out of place by a load of donnage being hoisted from the hold, further the officers of the steamship "West Cape" were incompetent, further that the respondents owe a special duty to Vernon L. Phillips, jr., because of his youth and inexperience. And libelant, claims, in the event that negligence is not established, for wages, maintenance and cure."

Wherefore libelant prays leave to amend as above set forth.

DANIEL O. HASTINGS,
JOHN H. SKEEN,
Proctors for Libellant.

STATE OF MARYLAND,
City of Baltimore, to wit:

I hereby certify that on this 22nd day of December, 1922, before the subscriber, chief deputy clerk, District Court of the United States for the District of Maryland, personally appeared John H. Skeen, proctor for Vernon L. Phillips, jr., and made oath in due form of law that the matters and facts in the foregoing petition contained are true to the best of his knowledge, information and belief.

CHAS. W. ZIMMERMANN,
Chief Deputy Clerk, District Court of the United States for the District of Maryland.

195 *Order*

On the foregoing petition and affidavit, it is by the court this 22nd day of December, 1922, ordered that the libellant have leave to amend as prayed.

JOHN C. ROSE,
U. S. District Judge.

UNITED STATES OF AMERICA,
District of Maryland, to wit:

I, Arthur L. Spamer, clerk of the District Court of the United States, do hereby certify that the aforegoing is a true copy petition to amend libel and order of court thereon, which was entered and filed on the 22nd day of December, 1922, in the therein entitled matter of Vernon L. Phillips, jr., by Vernon L. Phillips, his next friend, *v.* The United States of America, The United States Shipping Board Emergency Fleet Corporation, now or late owners of the steamship "West Cape" and also The Baltimore Steamship Company, a body corporate, operators of said vessel, No. 900 Admiralty in said District Court.

In testimony whereof I hereunto set my hand and affix the seal of said District Court this 3rd day of October, 1924.

ARTHUR L. SPAMER,
Clerk of said District Court.

196 In United States District Court for the District of Maryland

[Title omitted.]

Exhibit 5 in evidence

To the Honorable John C. Rose, judge of said court:

The exception and answer of the United States of America, United States Shipping Board Emergency Fleet Corporation, and The Baltimore Steamship Company, a body corporate, to the libel of Vernon L. Phillips, jr., by Vernon L. Phillips, his next friend, herein exhibited against them, respectfully shows:

(a) Your respondents aver that the allegations of negligence are altogether too general, vague, and indefinite to adequately reply thereto, and therefore except to said libel, and pray that the court may either dismiss the said libel, by reason of said
197 defects, or, in the alternative, require of the libellant allegations of such specific and definite acts of alleged negligence as may put the respondents in position to properly inquire into and answer the same.

(b) Your respondents, however, while reserving all manner of exceptions to the said libel, by reason of the insufficiency thereof, for answer, nevertheless, say,:

First. They admit the allegations of the first article of the libel, except that they deny that the Baltimore Steamship Company, a body corporate, was the owner of the steamship "West Cape."

Second. They deny the allegations of the second article of the libel, other than to admit libellant was injured on the steamship "West Cape" on the day alleged.

Third. They deny the third article of the libel, and aver that they furnished the libellant a safe place to work, and that the injury

suffered by said libellant was not due to any failure of the respondents to furnish the libellant a safe place in which to work.

They further aver that the vessel was in all respects seaworthy, and the tackle and gear in use aboard her were sufficient in quantity and quality, and that the accident causing injury to the libellant was not caused by any unseaworthiness or insufficiency of the ship in any of its parts, the tackle and gear or other equipment of said vessel, no part of which broke or gave way, and that the accident was not due to any cause for which the ship or her owners can be held liable.

198 Fourth. They have no knowledge of the matters alleged in the fourth article of the libel, and can therefore neither admit nor deny the same, but demand strict proof thereof, in so far as the same may be material.

Fifth. They deny that "all and singular the premises are true," but admit the admiralty and maritime jurisdiction of this honorable court.

Sixth. Further answering, the respondent, Baltimore Steamship Company, a body corporate, says that it is not now, nor ever was the owner of the steamship "West Cape," but avers that it was operating said steamship, as agent, in the premises, for and on behalf of the United States Shipping Board Emergency Fleet Corporation, and no action will not lie against the Baltimore Steamship Company, a body corporate.

Wherefore, respondents having fully answered the libel herein, pray that the same may be hence dismissed with their reasonable costs.

AMOS W. W. WOODCOCK,
U. S. Attorney.
By GEORGE FORBES, of Counsel,
Proctors for Respondents.

STATE OF MARYLAND,
City of Baltimore, to wit:

I hereby certify, that on this 15th day of December, 1922, before me, the subscriber, a notary public of the State of Maryland, in and for Baltimore City aforesaid, personally appeared George

199 Forbes, and made oath in due form of law that he is, of counsel, for the respondents in the aforegoing case, that he has read the aforegoing answer and knows the contents thereof, and that the same is true as therein stated, to the best of his knowledge, information, and belief; that the reason this affidavit is made by him is that the master of the steamship "West Cape" is not now in the jurisdiction of this honorable court, and that the source of his information is from statements of officers of said vessel in his possession.

As witness, my hand and notarial seal.

[NOTARY'S SEAL.] HENRY L. WORTCHE,
Notary Public.

UNITED STATES OF AMERICA,
District of Maryland, to wit:

I, Arthur L. Spamer, clerk of the District Court of the United States for the District of Maryland, do hereby certify that the aforegoing is a true copy of the exception and answer to libel, which was entered and filed on the 15th day of December, 1922, in the therein entitled matter of Vernon L. Phillips, jr., by Vernon L. Phillips, his next friend, *v.* The United States of America, The United States Shipping Board Emergency Fleet Corporation and The Baltimore Steamship Company, a body corporate, No. 900 Admiralty, in said District Court.

In testimony whereof, I hereunto set my hand and affix the seal of the said District Court, this 3rd day of October, 1924.

[SEAL.] ARTHUR L. SPAMER,
Clerk of said District Court.

200 In the District Court of the United States, for the District of Maryland

[Title omitted.]

Exhibit 6 in evidence

ARTHUR L. SPAMER, Esq.,
Clerk.

SIR: Enter the decree in the above entitled case fully "Satisfied," "Contented" and "Paid," upon payment of costs by the respondent.

DANIEL O. HASTINGS,
JOHN H. SKEEN,
Proctors for Libellants.

201 UNITED STATES OF AMERICA,
District of Maryland, to wit:

I, Arthur L. Spamer, clerk of the District Court of the United States for the District of Maryland do hereby certify that the aforegoing is a true copy of an order of satisfaction, which was entered and filed on the 21st day of March, 1923, in the therein entitled matter of Vernon L. Phillips, jr., by his father and next friend, Vernon L. Phillips *v.* United States Shipping Board and Emergency Fleet Corporation, and Baltimore Steamship Company, Inc., a corporation, No. 900 Admiralty, in said District Court.

In testimony whereof, I hereunto set my hand and affix the seal of the said District Court, this 2nd day of October, 1924.

[SEAL.] ARTHUR L. SPAMER,
Clerk U. S. District Court.

202 In United States District Court, Eastern District of New York

[Title omitted.]

Order settling bill of exceptions

The foregoing bill of exceptions contains all the proceedings, evidence and testimony in any way material to the exceptions sought to be reviewed, except the stenographic minutes of the trial of the libel in the District Court of the United States for the District of Maryland, marked "Exhibit No. 7" for identification at the trial in this court, which minutes the attorneys herein have stipulated shall be considered a part of the bill of exceptions and included in the record to be sent to the Circuit Court of Appeals by the clerk of this court. The foregoing bill of exceptions is hereby settled and allowed; signed and ordered to be made a part of the records in this cause, this 8th day of January, 1925.

EDWIN L. GARVIN,
U. S. D. J.

203 In United States District Court, Eastern District of New York

[Title omitted.]

Stipulation re bill of exceptions

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that the foregoing contains all the proceedings, evidence and testimony in any way material to the exceptions sought to be reviewed, except the stenographic minutes of the trial of the libel in the District Court of the United States for the District of Maryland, and it is agreed that said stenographic minutes, marked Exhibit No. 7 for identification at the trial, shall be considered a part of the bill of exceptions and included in the record to be sent to the Circuit Court of Appeals by the clerk of the United States District Court for the Eastern District of New York. It is further agreed that the foregoing shall be settled as the bill of
204 exceptions herein, allowed, signed and certified and made a part of the records in this cause.

Dated, New York, January 6, 1925.

EDGAR J. TREACY,
Attorney for Plaintiff.
RALPH C. GREEN,
U. S. Attorney.
EDGAR G. WANDLESS, of counsel,
Attorney for Defendant, U. S. S. B.
NATHAN A. SMYTH,
Attorney for Baltimore S. S. Co.

In United States District Court, Eastern District of New York

[Title omitted.]

Petition for writ of error

And now come United States Shipping Board Emergency
205 Fleet Corporation and Baltimore Steamship Company, defendants herein, and say that on or about the 10th day of October, 1924, this court entered judgment herein in favor of the plaintiff and against these defendants in which judgment and proceedings had heretofore in this cause certain errors were committed to the prejudice of these defendants, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, these defendants pray that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the second circuit, for the correction of errors so complained of, and that transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

RALPH C. GREENE,
U. S. Attorney.
EDGAR G. WANDLESS, of counsel,
Attorney for Defendant, United States Shipping Board Emergency Fleet Corporation.
NATHAN A. SMYTH,
Attorney for Defendant, Baltimore Steamship Company.

Office & P. O. Address, 45 Broadway, Borough of Manhattan, City of New York.

206 Citation in usual form omitted in printing.

207 In United States District Court, Eastern District of New York

[Title omitted.]

Assignments of Error

The defendants above named, by Ralph G. Greene, U. S. Attorney for the Eastern District of New York, and Nathan A. Smyth, their solicitors, assign error in the judgment in this case, because the court erred.

1. In ordering the defendants, by order dated April 21, 1924, to show cause before the court on April 23, 1924, why the motion to dismiss the complaint herein upon the ground that the action is res judicata should not be reargued, when the court was without jurisdiction by reason of the fact that the case was then pending in the Circuit Court of Appeals on a writ of error directed to the court below.

208 2. In granting the motion of plaintiff for a reargument of the motion made by defendants for a judgment on the plead-

ings dismissing the complaint herein on the ground that the action is res judicata, and in vacating and setting aside the order of the court dated February 25, 1924, dismissing the complaint, and restoring the action to the day calendar of said court for trial, by order dated the 20th day of May, 1924.

3. In admitting testimony over objection and exception, as follows:

"Q. Did Captain Baker say anything to you? A. Yes.

"Q. Tell us what Captain Baker said to you on the bridge on that occasion.

"Objected to as incompetent.

"Objection overruled.

"Exception.

"A. Mr. Lapoint, for God's sake, go down on that main deck. Somebody is going to get hurt."

4. In denying defendants' motions to dismiss the complaint at the close of plaintiff's case, as follows:

"Mr. Hilton: I move to dismiss the complaint on the ground that the plaintiff has failed to prove facts sufficient to constitute a cause of action; that he has failed to prove the allegations set forth in his complaint; that he has failed to prove negligence as against the United States Emergency Fleet Corporation, on behalf of which this motion is being made. I also make the same motion on
209 behalf of the other defendant, The Baltimore Steamship Company.

"The Court. Each motion is denied.

"Mr. Hilton. I except for both defendants."

5. In refusing to admit in evidence the certified docket entries entered in the District Court of the United States for the District of Maryland, over exception, as follows:

"Mr. Hilton. Under the affirmative defense set up in this action of a former adjudication I offer in evidence the docket entries entered in the District Court of the United States for the District of Maryland, these docket entries being certified by the clerk of the said District Court.

"Mr. Treacy. I object as incompetent, irrelevant, and immaterial, first; and secondly, which I should like more strongly put, is this: That this defense and this question of law was passed upon by stipulation entered into by the plaintiff and the Baltimore Steamship Company, as follows:

"'It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the separate affirmative defense contained in the 15th paragraph of the defendants' answer, wherein the defendants set up the plea of res adjudicata, shall be argued and settled by the court before the said case is tried,' and so on.

"That stipulation was prepared by the defendants' attorney and was submitted to me and was consented to by both attorneys.
210 In accordance with the stipulation, the entire matter was submitted to Judge Inch, sitting in the trial term as a district

judge in this court, and he passed upon it, and he passed upon it finally so far as the trial of this cause is concerned. It seems to me that to ask your honor now to repass upon this settled question, settled by order of Judge Inch, is to ask Your Honor to sit as a tribunal, to ask one district judge to pass upon the order and determination of another district judge. The only tribunal that may hear this question now is the Circuit Court of Appeals. I make my objection to any offers in evidence in that matter.

"The COURT. Will you give the court the benefit of your opinion, Mr. Hilton, with respect to the reading of that stipulation?

"Mr. HILTON. Yes. I think the purpose of that stipulation was an endeavor on that point to bring it before the court and, if possible, dispose of it, but not to the extent that an interlocutory decree which was not appealable should preclude the rights of the defendants here, which are all-important in this litigation, to present the record on the trial. I do not see how the stipulation could in any way waive the rights of the defendants.

"The COURT. What does the word 'settled' mean as used in the stipulation? I am in difficulty to attach any other meaning than that you two gentlemen by your own stipulation have taken from the court this matter. I shall have to so rule, and you may have your exception, Mr. Hilton.

"Major DREYER. When this matter came up and this de-
211 fense had been set up we did not have at the time correctly certified copies of the proceedings of the court below, so for the purpose of getting the matter before the court, and so as to have the benefit of attested signatures, we entered into a stipulation that the judge should hear this matter and could use these papers. That was the principal idea.

"The COURT. What is to be settled by the court?

"Major DREYER. The main idea was that he would not object to our using those papers, and this stipulation was therefore drawn up at that time.

"The COURT. I can only go by the original stipulation and I fear I shall have to sustain the objection so long as there are no disputed facts. Was this stipulation made between the parties as Mr. Treacy has stated?

"Major DREYER. Yes.

"The COURT. That appears on page 4 of the transcript of record and the clerk may mark that page in evidence so that the stipulation may appear as a part of the case now.

"Major DREYER. I want to add that the case was argued on the motion to dismiss on the ground of res adjudicata and it was dismissed. Subsequently, Mr. Treacy moved for a reargument of the case and the case was then, over our objection, reargued and Judge Inch reversed the decision. We could not appeal from that decision. So now he has refused to dismiss and give a judgment on the pleadings, and we are up for trial and we have an affirmative defense that we have got to prove and for that reason Mr. Hilton is now

offering that testimony. If your Honor will take the first
212 opinion which was rendered by Judge Inch, and which is in this paper, you will see that he says, 'for judgment on the pleadings.' That is on page 67:

"'This is a motion for judgment on the pleadings pursuant to a stipulation signed by the attorneys for all parties and duly filed herein. The motion is made by the defendants, and is based by them upon the plea of res adjudicata set up in defendants' answers.'

"Then it gives the opinion. He has denied the motion and we are left in the position that he has denied a motion for judgment on the pleadings.

"The COURT. Objection sustained, and the two defendants may have exceptions.

"Mr. HILTON. I do not see how this stipulation made by Mr. Treacy and Major Dreyer can be deemed to be a final settlement of this plea. The stipulation does not purport to show that it is a final settlement. That on the trial the defense shall be precluded from giving its evidence under the plea or that it shall be such final settlement that this defense under the plea can not be presented either to this court or perchance to an appellate court, I do not think from reading this stipulation that it can be deemed other than an effort to bring this matter before a coordinate judge of this court. I do not know that the ruling of Judge Inch is any final ruling, or should be, on the part of this court, although it may be argued that there would be a tendency of the court to, so far as it could, sustain a co-
213 ordinate judge. I do not believe this stipulation should be construed to waive such rights, which are very vital under procedure under the Constitution.

"The COURT. It is very difficult for the court to attach any other meaning whatever to the word 'settled,' as used in that stipulation. When you gentlemen agreed that the matter should be submitted to the court before trial and settled, it seems to me that that settled it. The objection is sustained and the defendants may each have an exception.

"Mr. HILTON. I ask that the document offered in evidence be marked for identification.

"The COURT. It is so ordered.

"The paper is marked Defendants' Exhibit 1 for identification."

6. In refusing to admit in evidence certified copy of a final decree of the District Court of the United States for the District of Maryland in an action between the same parties herein, over exception, as follows:

"Mr. HILTON. I will offer in evidence a decree captioned 'A Final Decree of the District Court of the United States for the District of Maryland in the action '——

"Mr. TREACY. I do not think that these documents should be read, and I object.

"Objection sustained.

"Mr. HILTON. I ask that this decree be marked for identification and except to your Honor's exclusion in evidence.

"The COURT. It may be marked for identification.

"It is marked Defendants' Exhibit 2 for identification."

214 7. In refusing to admit in evidence certified copy of the libel and complaint in the action in the United States District Court for the District of Maryland brought by the plaintiff herein against the defendants herein, over exception, as follows:

"Mr. HILTON. I offer in evidence the libel and complaint in the action in the United States District Court for the District of Maryland.

"Same objection.

"The COURT. Are these all offered under what has been described as the defense contained in Par. 15 of the answer?

"Mr. HILTON. Yes, sir.

"Objection sustained.

"Mr. HILTON. Both defendants except. I ask that this be marked for identification.

"It is marked Defendants' Exhibit 3 for identification."

8. In refusing to admit in evidence certified copy of the amendment to the libel in the action in the United States District Court for the District of Maryland brought by the plaintiff herein against the defendants herein, over exception, as follows:

"Mr. HILTON. I offer in evidence a certified copy of the amendment to the libel.

"Objected to.

"The COURT. That is also under Par. 15 of the answer?

"Mr. HILTON. Yes.

"The COURT. Excluded.

"Mr. HILTON. On behalf of both defendants I except.

215 "Mr. HILTON. I ask that this certified copy be marked for identification.

"The COURT. It is so ordered.

"It is marked Defendants' Exhibit 4 for identification."

9. In refusing to admit in evidence certified copy of the exception and answers filed in the District Court of the United States for the District of Maryland, to the libel brought by the plaintiff herein against the defendants herein, over exception, as follows:

"Mr. HILTON. I offer in evidence exception and answer filed in the District Court of the United States for the District of Maryland, certified by the clerk of the United States district court for that district.

"Same objection.

"The COURT. Does it involve the same question of law as the others?

"Mr. HILTON. Yes, your Honor.

"The COURT. Excluded.

"Mr. HILTON. Both defendants note an exception.

"Mr. HILTON. I ask that the document be marked for identification as part of the record.

"The COURT. It is so ordered.

"It is marked Defendants' Exhibit 5 for identification.

10. In refusing to admit in evidence certified copy of the satisfaction piece of the action in the United States District Court for the District of Maryland, brought by the plaintiff herein against the defendants herein, over exception, as follows:

216 "Mr. HILTON. I offer in evidence a certified copy in the action in the District Court of the United States for the District of Maryland of the satisfaction piece of that action.

"Same objection.

"The COURT. Does that involve the same question of law?

"Mr. HILTON. Yes, sir.

"The COURT. Excluded.

"Mr. HILTON. Both defendants note an exception, and I ask that it be marked for identification.

"The COURT. It is so ordered.

"It is marked Defendants' Exhibit 6 for identification."

11. In refusing to admit in evidence the entire record and stenographic minutes taken by the official stenographer in the District Court of the United States for the District of Maryland at the trial of the action between the same parties herein, in the District Court of the United States for the District of Maryland, over exception, as follows:

"Mr. HILTON. I offer to prove in evidence through the official stenographer, who is in court, the entire record and stenographic minutes taken in the District Court of the United States in Baltimore in the action tried in that court.

"Same objection, ruling, and exception on behalf of defendants."

12. In refusing to admit in evidence the stenographic minutes taken at the trial of the action between the same parties herein

217 in the District Court of the United States for the District of Maryland, over exception, as follows:

"Mr. HILTON. I would like, if I may have the privilege before resting, to offer the stenographic minutes in evidence, having offered the proof of the stenographer who took them, who is here in court, in the action which is set forth in the plea in the answer.

"Mr. TREACY. I make the same objection and object further on the ground that they would be in no event evidence of anything; that the only proper evidence would be the reading of the original notes taken by the stenographer to the proceeding.

"The COURT. The same question of law, among others, is involved in this objection?

"Mr. TREACY. I assume that it is.

"Objection sustained.

"Mr. HILTON. Both defendants respectfully except to your Honor's ruling, and I ask that the minutes be marked for identification.

"The COURT. They may be marked.

"The minutes are marked Defendants' Exhibit 7 for identification."

13. In admitting in evidence the stipulation between the attorneys for the parties herein, marked Plaintiff's Exhibit "L," over objection and exception, as follows:

"Mr. TREACY. May I be sure that we have this stipulation marked as directed?

"The COURT. I have directed that it be marked in evidence.

218 "Mr. TREACY. It is very important that it should be marked.

"The COURT. Yes; it may be marked.

"The COURT. The court directed that to be marked in evidence after the counsel had stated that the stipulation consisted of what was read by the parties, and that this was a correct copy of the stipulation. If you desire to have the original we will suspend and get the original.

"Mr. HILTON. It is a correct copy. I wish to note on the record an objection and an exception also to the stipulation going in evidence as no part of the record, I think, under the plea in the answer of the two defendants.

"The COURT. No objection is made to this paper being marked in evidence because it is a copy of the original stipulation?

"Mr. HILTON. No, your Honor; the copy is correct. My objection would go even to the original, which is exactly the same as this.

"The COURT. Objection overruled.

"Mr. HILTON. Both defendants note an exception.

"The paper is marked Plaintiff's Exhibit L."

14. In denying motion of defendant, United States Shipping Board Emergency Fleet Corporation to dismiss the complaint at the close of the case, as follows:

"Mr. HILTON. I renew the motions made at the end of the plaintiff's case on the grounds stated at that time. This motion at this time is made on behalf of the defendant United States

219 Shipping Board Emergency Fleet Corporation to dismiss the complaint on the ground that the plaintiff has failed to prove facts sufficient to constitute a cause of action; that he has failed to prove the allegations set forth in his complaint; that he has failed to prove negligence as against the United States Emergency Fleet Corporation.

"I also make the motion in behalf of the other defendant, the Baltimore Steamship Company, on the same grounds.

"The COURT. Each motion is denied.

"Mr. HILTON. Both defendants note an exception."

15. In charging jury, as follows:

"Now you must determine whether or not the defendants, or either of them, is responsible for the accident by reason of the negli-

gence of one of their employees. Both defendants are corporations, so they must act through their agents, and if you find that an employee or representative of the defendants in the operation of the boat conducted himself in a negligent manner so that, as a result, the plaintiff received this grievous injury by reason of the falling of the strong back, as has been described to you, then you will find that the plaintiff is entitled to recover such damages as the circumstances justify as disclosed by the evidence, unless you find at the same time that the plaintiff was conducting himself negligently at the time, and that his negligence caused the injury. But if you find that the accident was the result of carelessness on the part of the
220 defendants in the operation, you will be justified in rendering a verdict in favor of the plaintiff. It is for you to determine whether, without any evidence being offered on behalf of the plaintiff, the evidence as disclosed by the defendants was of a character to justify you in finding affirmatively that the accident was caused by lack of care on the part of the plaintiff, and unless you can find such to be the case you can disregard that feature of the case and consider whether or not the accident was caused as a result of the negligence of the defendants' representative.

"The COURT. Are there any exceptions to the charge, or any requests to charge?

"Mr. HILTON. The defendant, Emergency Fleet Corporation, excepts to all that part of your Honor's charge where you submit questions of negligence to be decided by the jury as against it; also the Baltimore Steamship Company excepts to that part of the charge where you submit to the jury questions of negligence against it.

"The COURT. Do you hold that no negligence has been established on the part of either defendant, and that the case should have been dismissed on that ground?

"Mr. HILTON. I hold that under the pleadings and under the defendants' answer, which places in issue questions of negligence, that from the point of view of these two defendants no question of negligence should be submitted, based on the plea in the answer. I think that under the plea, if I am right, that there is no such issue.

221 "The COURT. I will give each of the defendants an exception. Have the defendants any requests?

"Mr. HILTON. None."

16. In denying defendants' motion to set aside the verdict for a new trial, as follows:

"Mr. HILTON. I move to set aside the verdict on behalf of the Emergency Fleet Corporation on the ground that there has been no evidence in this case of the operation of the boat by the Emergency Fleet Corporation, on the ground that this verdict is excessive in amount, contrary to law, and on all the grounds specified in that section of the Practice Act except that of insufficiency of damages. I make the same motion on behalf of the other defendant, the Baltimore Steamship Company on the same grounds.

"The Court. Motion denied.

"Mr. Hilton. Both defendants note an exception."

Wherefore, defendants pray that the judgment of the said District Court of the United States for the Eastern District of New York be reversed, and that the District Court be directed to grant a new trial of the said cause.

Dated, New York, January 8th, 1924.

Ralph C. Greene, *U. S. Attorney.*
Edgar G. Wandless, of counsel,
Attorneys for Defendant, United States Shipping Board Emergency Fleet Corporation.

222 Nathan A. Smyth,
Attorney for Defendant, Baltimore Steamship Company.

Office & P. O. address, 45 Broadway, Borough of Manhattan, city of New York.

To Edgar J. Treacy, Esq., attorney for plaintiff, office & P. O. address, 15 Park Row, Borough of Manhattan, city of New York.

Bond for damages and costs for $45,000 approved; omitted in printing.

227 In United States District Court, Eastern District of New York

[Title omitted.]

Stipulation re transcript of record

It is hereby stipulated and agreed that the foregoing is a true and correct transcript of the record of the said district court in the above entitled case as agreed upon by the parties.

Dated, New York, March 20, 1925.

Edgar J. Treacy,
Attorney for Plaintiff.
Ralph C. Greene,
U. S. Atty.
Edgar G. Wandless, of counsel,
Attorney for defendant U. S. S. B. E. F. C.
Nathan A. Smyth,
Atty. for Deft. Baltimore S. S. Co.

Upon the above stipulation it is ordered that the foregoing printed record be filed for use by the clerk of this court, in lieu of the original papers in certifying a record on appeal.

Dated Mar. 25, 1925.

Edwin L. Garvin,
U. S. D. J.

Clerk's certificate to foregoing transcript omitted in printing.

230 In United States Circuit Court of Appeals for the Second Circuit

BALTIMORE STEAMSHIP COMPANY AND UNITED STATES SHIPPING BOARD Emergency Fleet Corporation, plaintiffs in error (defendants below)

against

Vernon Phillips, an infant, by Vernon Phillips, his guardian ad litem, defendant in error (plaintiff below)

Opinion

Before Rogers, Manton, and Hand, circuit judges.

Writ of error to a judgment of the District Court for the Eastern District of New York in an action at law.

The plaintiff was engaged as seaman upon the steamer "West Cape," owned by the defendant, United States Shipping Board Emergency Fleet Corporation, and operated by the defendant, the Baltimore & Ohio Steamship Company. While so employed he was injured in the hold of the vessel by the negligent removal of certain dunnage, the details of which it is not necessary to set forth. Some of the strongbacks in the hatchway had not been taken out, one of which the dunnage or whip caught and displaced under the pull of the winch; it fell and injured the plaintiff. The action was brought under section 20 of the act of June 5, 1920, commonly known as the Jones Act.

The plaintiff had previously filed a libel in the admiralty in the District Court for the District of Maryland against these defendants and the United States of America for the same injuries,
231 claiming indemnity. In the libel the only allegations of fault were as follows: "In failing to provide him with a safe place in which to do the work required of him, and in failing to use reasonable care to avoid striking him, and to the unseaworthiness and insufficiency of the gear and tackle employed on board said vessel."

On exception by the respondents for insufficiency of statement the libellant prayed leave to amend by adding as specifications of negligence the following: "In the failure of the respondent, the United States of America, to provide a cleat or socket of proper design and sufficient strength to support the strongback when one end of it was negligently knocked out of place by a load of dunnage being hoisted from the hold; further, the officers of the S. S. "West Cape" were incompetent; further that the respondents owed a special duty to Vernon L. Phillips, jr., because of his youth and inexperience, and libellant claims that in the event that negligence is not established, for wages, maintenance, and cure."

The District Court of Maryland dismissed the libel for indemnity, but awarded the plaintiff five hundred dollars for maintenance and cure. In the opinion of the district judge it appears that he deemed

the case to depend wholly on the charges of fault set up in the amendment just quoted, though he thought the work had been done negligently by the master and crew.

The defendants pleaded in bar the decree on the libel and the district court sustained the plea and dismissed the complaint on February 25, 1924. To this judgment the plaintiff took a writ from this court, but while it was pending, and on April 21, 1924, by rule nisi, moved the District Court for a reargument. On May 2, 1924, the district judge requested this court to remit the record, which it at once did, and thereupon on May 20, 1924, the District Court vacated the judgment of February 25, 1924, and set down the cause for trial.

232 The defendants raise three points: First, that the District Court had no jurisdiction to vacate the judgment of dismissal; second, that the decree upon the libel in admiralty was res judicata; and third, that it was error to exclude as evidence in the trial below the decree, pleadings, and testimony in the admiralty suit.

Joseph M. Dreyer for the plaintiff in error.

Edgar J. Treacy for the defendant in error.

Hand, C. J.: The first point is whether the cause was before the District Court at the time when Judge Inch vacated the order dismissing the complaint and set down the case for trial. The term had not yet expired, because ninety days had not passed since the entry of the judgment, and the rules of the District Court for the Eastern District of New York then in force extended all terms for such purposes for that period. Except for the writ of error the judgment was therefore still in gremio, and the court might have taken any action in respect of it which seemed to it proper. However, the writ had removed the cause into this court, and while outstanding, it prevented any action by the District Court without our leave. The parties and the learned judge plainly proceeded under the authority of Roemer *v.* Simon, 91 U. S. 149. That was the case of an application to the Supreme Court to remit to the Circuit Court for the admission of new evidence. The decree appealed from was final and the term had expired, for which reason the court denied the motion as the Circuit Court could have done nothing in the cause after remittitur. But they laid down the proper practise, if the term had been open, which is for the appellant to apply to the lower court to reopen the decree, and for that court to request the upper court to remit.

233 Of course, the appellant may always move to dismiss his appeal. Greene *v.* United, etc., Co., 124 F. R. 961 (C. C. A. 1), and no request is necessary for that purpose. But in so doing he risks all on his cast in the District Court, for it may be too late after decision for a new appeal. Similarly, if on the appellant's motion the District Court asks for a remittitur before deciding the

motion, as was apparently the case in Mossberg *v.* Nutter, 124 F. R. 966 (C. C. A. 1), and as the District Court did in the case at bar. The safest way is for the District Court, if disposed to entertain the motion at all, to ask leave of this court to do so. If this is given it may proceed, the appeal still pending. Should it decide to reopen, it may then request remittitur, and the appellant will have risked nothing. This was the course approved by the Circuit Court of Appeals for the Sixth Circuit in Meccano *v.* Wagner, 235 F. R. 890, and we also approve it. Sundh Elec. Co. *v.* Cutler-Hammer Mfg. Co., 244 Fed. Rep. 163, 170, 171.

In the case at bar it does not appear that the District Court entertained the motion on the merits at all before asking for the remittitur. The affidavits answering the rule nisi were sworn to on April twenty-eighth, and the cause was remitted on request of the court on May second. While the District Court should not entertain the motion on the merits without leave, obviously it must read the papers so far as to learn the nature of the application and whether it will proceed with it to request either leave of this court or a remittitur. In requesting a remittitur, perhaps, the District Court imperiled the plaintiff's rights to any review if it remained of the same opinion, but still it got jurisdiction. If it was necessary for the plaintiff specifically to move the District Court to request a remittitur because of this danger to his rights, that was an error of which the defendants may not complain. Assuming it was
234 also error to request the remittitur without notice to the defendants, which might have an interest in maintaining the pendency of the writ, that is not assigned here, and we see no reason to take it up nostra sponte. The writ was automatically dismissed on the remittitur, the District Court got jurisdiction, and the point is not well taken.

On the question of res judicata the pleadings show that the issue of the negligence of the ship's officers was not presented in the admiralty suit. It is true that the libel in article third alleged that the respondents had been guilty of negligence not only in failing to provide Phillips with a safe place to work and in furnishing unseaworthy and insufficient gear, but also "in failing to use reasonable care to avoid striking him." The last clause, standing alone, might have admitted evidence of the negligence of his fellow servants in handling seaworthy gear, but it did not so stand. The respondents excepted to the libel because the allegations of negligence were "too general, vague, and indefinite" and asked that the libellant should allege "specific and definite acts of alleged negligence." The exceptions apparently never came on for hearing but, instead, the libellant prayed leave to amend "by adding the following specifications of negligence to the third paragraph (sic) of the libel." Then follows the proposed amendment: Libellant alleges the negligence claimed consists "in the failure of the respond-

ent, United States of America," to provide a proper cleat, in manning the ship with incompetent officers, and in failing in special care of the libellant because of his youth.

We think that this amendment, being in answer to an exception for informality in the statement of the cause of suit, was plainly intended as a videlicet to the general allegations of article three. True, the prayer was to amend by "adding the following specifications of negligence," but the amendment is to be read in the
235 light of its purpose, and that was to stand upon the specific faults therein alleged. If so, there was no allegation of negligence in handling the winch, and the libel would not have admitted the evidence on which recovery was had in the case at bar. That this was in fact the view taken by all sides is apparent from the opinion of Judge Ross dismissing the libel.

However, while it is true for the reasons just given, that the libellant could not have recovered under his libel as amended, it by no means follows that the decree is not a bar to this action. An earlier judgment is a bar, not only when the facts actually litigated are the same, but also as to any other relevant facts which would have supported the same cause of action, U. S. *v.* California etc. Co., 192 U. S. 355. The rule is too well settled to require abundant citation, but much difficulty arises over the meaning of the phrase, "cause of action."

In the case of a suit for personal injuries, it is indeed possible to regard the action as based alone upon the plaintiff's bodily injury. So viewed, a battery would be the same cause of action as an action on the case for unintentional injury. The question would be irrelevant whether the injury, in fact caused by the defendant, was intentional or careless. The material fact would be the injury itself and its causation by the defendant. History alone forbids such a view, though eventually the law may assume that form, 8 Harv. Law Review, 1.

Nevertheless, among actions on the case it would still be possible to adopt the theory, somewhat mutilated to be sure, but consistent so far as it went. Confined to acts which were unintentional, the law might regard the injury and its causation as alone constituting the cause of action, treating as a variant, immaterial in the definition of the species, the kind of neglect which cut off the de-
236 fendant's excuse that the injury was not intended. So viewed, it would be the same cause of action whether the defendant had installed unseaworthy gear, or had been careless in the use of seaworthy gear.

But a defendant's liability in such cases might depend upon a quite opposite notion: that is, that he owed a duty of care in the use of such gear as he installed and another duty to install seaworthy gear. In that view the cause of action would differ according as the plaintiff charged him with one or the other default, and a judgment on the

one would not be a bar to the other. We concede that the law has not come to a definite conclusion between the two theories, and cases may be found taking either view, but obviously we are to be controlled by that taken by the Supreme Court so far as it has declared itself.

The nearest case is Troxell *v.* D. L. & W. R. R. Co., 227 U. S. 434, which, we think, favors the plaintiff. Troxell's widow had sued the defendant alleging that it had failed to provide proper safety appliances under the Pennsylvania statute. She lost, and brought a second action based on the employers' liability act for the negligence of the defendant's servants in handling its cars. The first judgment was held not to be a bar. The case may, it is true, be distinguished on the ground taken by Mr. Justice Lurton, that the parties were not the same, because in the second suit, the widow sued as administratrix. Yet the decision goes much further, because the court clearly held that it was one cause of action not to furnish safe cars and another to use safe cars carelessly.

It is not perfectly certain that, had the plaintiff in the first action relied upon the employers' liability act, as she might (because that includes defective appliances), the result would have been the same.

That is indeed the case at bar, since the Jones Act incorporates
237 the employers' liability act. But if we ignore the difficulty arising from the distinction in the plaintiff's persona, it appears to us that there could be no logical differences. If the "cause of action," as the defendants at bar must maintain, consists of the injury and its origin from the defendant in one way or another, it can not be a distinction that in Troxell's case the defendant's faults were defined in two statutes, while in the case at bar they are to be found in one. The crux of the question rests not in the sources of the faults, but whether the law regards them as constitutive or only regulative of the basis of recovery. No doubt that in the end is a conventional question, but then so is most of the law. Perhaps it would be practically better to insist that a person injured by another should bring forward at one time all the reasons why he should recover. Yet there is a clear difference between injuring an employee because of inattention in the conduct of one's work and because of failing to furnish proper tools. The difference appears to us at least, as substantial as between injuring him intentionally and unintentionally. It does not follow because such diverse situations may be divided, that a plaintiff may sever by separate suits different acts of negligence in the conduct of the work. It is enough for the present that the Supreme Court has countenanced the severance here necessary.

The exclusion of the roll in the admiralty suit was proper after what we have said. No fact actually adjudicated in the suit was material to the disposition of the action. As an estoppel it was irrelevant; as a bar it was bad.

Judgment affirmed.

238 In United States Circuit Court of Appeals

[Title omitted.]

Judgment filed Nov. 16, 1925

Error to the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said district court be and it hereby is affirmed with interest and costs.

It is further ordered that a mandate issue to the said district court in accordance with this decree.

H.W.R.
M.T.M.

239 [File endorsement omitted.]

240 Clerk's certificate to foregoing transcript omitted in printing.

241 Supreme Court of the United States

Order allowing certiorari

Filed March 8, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

MARCH 8, 1926.

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. —

BALTIMORE STEAMSHIP COMPANY AND UNITED States Shipping Board Emergency Fleet Corporation, Petitioners

v.

VERNON PHILLIPS, AN INFANT, BY VERNON PHILLIPS, his guardian ad litem

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

The Solicitor General, on behalf of petitioners, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on November 16, 1925.

STATEMENT OF THE CASE

This petition involves a situation where an injured seaman instead of applying for and receiving compensation under the Federal Employees' Compensation Act of September 7, 1916, c. 458, 39 Stat. 742, to which he was entitled (34 Op. Atty. Gen. 363), brought suit to recover for personal injury.

After judgment against him, from which no appeal was taken, he brought a second suit to recover for the same injury. The courts below refused to sustain a plea of *res judicata,* the Circuit Court of Appeals deciding that the different allegations of fault in the two suits set forth two different causes of action for the same injury.

On July 24, 1921, Vernon Phillips (Philipps), a seaman on board the steamship "West Cape," was working in hold No. 1 of the vessel. (R. 103.) While dunnage was being removed from the hold, a strongback (or beam) fell from the hatch and struck Phillips's left ankle, fracturing it. (R. 106, 190.)

Phillips filed a libel in admiralty in the United States District Court for the District of Maryland, against the United States of America, the United States Shipping Board Emergency Fleet Corporation, and the Baltimore Steamship Company. (R. 189.) He set forth his injury, alleging (R. 190)—

> that his injuries were caused by the negligence of the respondents in failing to provide him with a safe place in which to do the work required of him and in failing to use reasonable care to avoid striking him, and to the unseaworthiness and insufficiency of the gear and tackle employed on board said vessel,

and claimed $15,000 indemnity. By amendment he alleged (R. 193-4)—

> that the negligence claimed consists in the failure of the respondent, the United States

> of America, to provide a cleat or socket of the proper design and sufficient strength to support the strongback when one end of it was negligently knocked out of place by a load of dunnage being hoisted from the hold, further the officers of the steamship "West Cape" were incompetent, further that the respondents owe a special duty to Vernon L. Phillips, Jr., because of his youth and inexperience. And libellant claims, in the event that negligence is not established, for wages, maintenance, and cure.

Phillips testified at the trial of the case. (R. 123, et seq.) Judge Rose filed an opinion (286 Fed. 631) finding that libellant's ankle had been fractured and ultimately his left leg had been amputated above the knee; that there was nothing whatever the matter with the construction or design of the cleat or socket which held the strongback; that the injury was caused by the grossly negligent way in which the dunnage was taken out of the hold; but that the record did not show lack of due care in selecting competent officers. He concluded his opinion by saying (p. 633):

> In this case, one cannot help regretting that under the authorities it is not possible to hold somebody for the needless and irreparable injury done this youth.
>
> As the decisions stand, however, all that may be awarded him is the cost of his maintenance and cure, which upon the testimony the parties agree amounts to $500.

A decree was entered on February 19, 1923, reciting that respondents were not liable to libellant for full indemnity but only for maintenance and cure. (R. 187.) No appeal was taken and the decree was satisfied. (R. 200.)

Subsequently on May 22, 1923, and *before the time limit for appeal in the first suit to the Circuit Court of Appeals had expired,* Phillips commenced a second action at common law in the Supreme Court of the State of New York against petitioners who were two of the three respondents in the first suit; the third, the United States of America, was not joined herein. (R. 3.) The complaint alleged again that the strongback or beam fell upon him, alleged (R. 7)—

> That the injuries to the plaintiff were directly caused by the negligence of the defendants and of the officers and their seamen in their employ in their negligent and reckless control and operation of said vessel and of said winch and appliances on the said vessel and in their operation thereof, in their disregard of the rights, presence and safety of the plaintiff and in their failure to give warning to the plaintiff of the impending danger.

and claimed $100,000 indemnity. (R. 4–8.) The case was removed to the United States District Court for the Eastern District of New York, (R. 12 et seq.) The answers filed by the petitioners set up, among other defenses, that of *res judicata.* (R. 24, 31.)

Upon motion for judgment upon the pleadings, the defense of *res judicata* was sustained by Judge Inch. (R. 70–75.) Subsequently, after the decision of this Court in *Panama Railroad Co.* v. *Johnson,* 264 U. S. 375, Judge Inch reversed his previous decision and held that the matter was not *res judicata.* (R. 88–97.) The ground of this decision is not clear, but is apparently that since Judge Rose erred in not entertaining the same view of the modifications of the maritime law occasioned by Section 33 of the Merchant Marine Act (Act June 5, 1920, c. 250, 41 Stat. 1007) as explained by this Court in *Panama Railroad Co.* v. *Johnson,* Mr. Phillips, though claiming indemnity, had not had his day in court. Trial was then had upon substantially the same proofs as in the Baltimore suit; the record in the Baltimore suit was tendered in evidence by petitioners and rejected (R. 158 et seq.); exceptions were taken.[1] (R. 161 et seq.) The case was allowed to go to the jury, which brought in a verdict for $40,000 (R. 170) and judgment entered.

Upon writ of error from the Circuit Court of Appeals, the decision was affirmed upon other grounds. (R. 230.) The court, speaking through Judge Learned Hand, held that a suit for injuries from unseaworthy gear was upon a different cause of action from a suit for the same injuries from negligent use of seaworthy gear. He stated, with-

[1] The record in the Baltimore suit has been printed in the present Record (Exs. 1-6, R. 184–201), with the exception of the opinion of Judge Rose, which is reported in 286 Fed. 631, and the testimony (Ex. 7, R. 163, 164), which was before the Circuit Court of Appeals (R. 202) and has been filed with the Clerk of this Court.

out citing them, that cases may be found in agreement with, and contrary to, the proposition, but concluded that *Troxell* v. *Del., Lack. & West. R. R.*, 227 U. S. 434, supported the proposition.

Petitioners believe that *Troxell* v. *Del., Lack. & West. R. R.* does not support the decision of the Circuit Court of Appeals, as appears in the following brief. No other cases supporting the decision have been found. On the other hand there are decisions of the Circuit Courts of Appeals for the First and Ninth Circuits (*Columb* v. *Webster Manufacturing Co.*, C. C. A., 1st, 84 Fed. 592; *Miller* v. *Spokane International Ry. Co.*, C. C. A., 9th, 293 Fed. 748) as well as a strong body of law in the State courts, which are clearly contrary to the decision in the instant case. Judge Hand's opinion is confessedly searching for a correct rule. Other Circuit Courts of Appeal, in their search, have reached a contrary result.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals for the Second Circuit is in conflict with decisions of the Circuit Courts of Appeals for the First and Ninth Circuits, so that a review by this Court is necessary for uniformity of decision in the Federal courts.

2. The case, involving as it does the proper understanding of the decision of this Court in *Troxell* v. *Del., Lack. & West. R. R.*, is of great importance, not only to shipowners, but also to all employers and employees, whether suing in the

Federal or State courts. Employers are required to furnish a safe place to work and fellow employees not known to be incompetent, and many statutes have removed the defense of the fellow-servant rule. The great dissatisfaction with suits for personal injury of employees has been reflected in legislation, particularly in the form of Compensation Acts, designed to give relief to employees, including those in the status of Phillips, without the expense or uncertainties of litigation.

To those who, in spite of statutory relief, prefer litigation, and to the defendants in such suits, it is of the utmost importance to know what constitutes the cause of action, not only for the facilitation of the suit, but also in order that there may be a conclusion of suits. If, as the great weight of authority indicates, the cause of action is based upon the wrongful injury, then there can be only one suit in which all of the grounds of alleged wrongfulness must be tried. If, as the decision in the instant case holds, the cause of action is based upon the particular wrongfulness alleged by the pleadings, then there may be as many separate suits as the ingenuity of counsel may urge separately, although the concurrent breaches of duty combine to give rise to only one injury. Indeed, as pointed out by the Circuit Court of Appeals for the First Circuit in *Columb* v. *Webster Manufacturing Co.,* 84 Fed. 592 at page 595, it inevitably follows that there may be, in addition to separate suits, separate recoveries for the same injury, each based upon the separate breach of duty which may be pleaded.

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The particular importance of the decision in the instant case to shipowners, and to the Government as shipowner, is that the Circuit Court of Appeals for the Second Circuit handles by far the greatest volume of such cases. The decision, unless reversed, will operate as a precedent for the cases in that circuit. From the respect paid to its decisions by courts which deal less frequently with maritime cases, the decision may also establish a precedent elsewhere, so that, even though wrong, it will be much more difficult to overthrow at a later date.

A decision by this Court, deciding between the conflicting rules, will explain what constitutes a cause of action for personal injury and when such actions are concluded. By the closest of analogies, the decision will apply to all tort cases where an injury arises from a violation of one or more duties owed to the injured party. The case therefore probes to the fundamentals of the application of the doctrine of *res judicata* in tort litigation, and is therefore of great public importance.

3. The case involves the construction and application of Section 33 of the Act of June 5, 1920, c. 250, 41 Stat. 988, 1007, and the Act of April 22, 1908, c. 149, 35 Stat. 65.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

JANUARY, 1926.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals has not yet been reported. It will, however, be found on page 230 of the Record. The District Court's opinions are at pages 70 and 88 of the Record.

JURISDICTION OF THIS COURT

1. The judgment of the Circuit Court of Appeals was entered on November 16, 1925. (R. 239.)

2. Jurisdiction of this Court to review the case is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE

The facts have been stated above in the petition (pp. 1–6), to which reference is respectfully made.

SPECIFICATION OF ERROR TO BE URGED

The error assigned and intended to be urged is the failure to sustain the plea of *res judicata*.

SUMMARY OF THE ARGUMENT

I. *Columb* v. *Webster Manufacturing Co.* (C. C. A., 1st), 84 Fed. 592, and *Miller* v. *Spokane International Ry. Co.* (C. C. A., 9th), 293 Fed. 748, are in conflict with the decision of the Circuit Court of Appeals for the Second Circuit

II. *Troxell* v. *Del., Lack. & West. R. R.*, 227 U. S. 434, does not support the decision of the lower court

ARGUMENT

The statute which governs the right of Phillips to recover indemnity for his injury is Section 20 of the Act of March 4, 1915, c. 153, 38 Stat. 1164, 1185, as amended by Section 33 of the Act of June 5, 1920, c. 250, 41 Stat. 988, 1007, which reads as follows:

> Section 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; * * *.

This Court considered and explained the statute in *Panama Railroad Co.* v. *Johnson*, 264 U. S. 375.

It is believed that a comparison of the record in the Baltimore and New York cases will show that the same issues were raised by the pleadings and testimony. The New York case was decided upon the negligence of the officers, and Judge Rose made the same finding in the Baltimore case (286 Fed. at 633).

However, review by certiorari is not asked alone upon this narrow ground. ***Review, because of conflict of circuits and the great public interest, is asked upon the broad ground that Phillips had only one cause of action, namely, for the injuries suffered from the wrongful dropping of the strong-***

back upon his ankle. Whatever breaches of duty made the dropping " wrongful " are but the *media concludendi* which do not constitute different causes of action, as decided by this Court in *United States* v. *California & Oregon Land Co.,* 192 U. S. 355, 358:

> The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means, that is to say, by evidence that the lands originally were excepted from the grant. But in this, as in the former suit, it seeks to establish its own title to the fee.
>
> It may be the law in Scotland that a judgment is not a bar to a second attempt to reach the same result by a different *medium concludendi. Phosphate Sewage Co.* v. *Molleson,* 5 Ct. of Sess. Cas. (4th Ser.) 1125, 1139; although in the same case on appeal Lord Blackburn seemed to doubt the proposition if the facts were known before. S. C., 4 App. Cas. 801, 820. But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He can not even split up his claim. *Fetter* v. *Beale,* 1 Salk. 11; *Trask* v. *Hartford & New Haven Railroad,* 2 Allen, 331; Freeman, Judgments, 4th ed. Secs. 238, 241; and, *a fortiori,* he can not divide the grounds of recovery.

I

Columb v. _Webster Manufacturing Co._ (C. C. A., 1st), 84 Fed. 592, and _Miller_ v. _Spokane International Railway Co._ (C. C. A., 9th), 293 Fed. 748, are in conflict with the decision of the Circuit Court of Appeals for the Second Circuit

The relevant portion of Judge Hand's opinion is as follows (R. 236):

> In the case of a suit for personal injuries, it is indeed possible to regard the action as based alone upon the plaintiff's bodily injury. So viewed, a battery would be the same cause of action as an action on the case for unintentional injury. The question would be irrelevant whether the injury, in fact caused by the defendant, was intentional or careless. The material fact would be the injury itself and its causation by the defendant. History alone forbids such a view, though eventually the law may assume that form, 8 Harv. Law Review, 1.
>
> Nevertheless, among actions on the case it would still be possible to adopt the theory, somewhat mutilated to be sure, but consistent so far as it went. Confined to acts which were unintentional, the law might regard the injury and its causation as alone constituting the cause of action, treating as a variant, immaterial in the definition of the species, the kind of neglect which cut off the defendant's excuse that the injury was not intended. So viewed, it would be the same cause of action whether the defendant had installed unseaworthy gear, or had been careless in the use of seaworthy gear.

But a defendant's liability in such cases might depend upon a quite opposite notion; that is, that he owed a duty of care in the use of such gear as he installed and another duty to install seaworthy gear. In that view the cause of action would differ according as the plaintiff charged him with one or the other default, and a judgment on the one would not be a bar to the other. We concede that the law has not come to a definite conclusion between the two theories, and cases may be found taking either view, but obviously we are to be controlled by that taken by the Supreme Court so far as it has declared itself.

The nearest case is *Troxell* v. *D. L. & W. R. R. Co.*, 227 U. S. 434, which, we think, favors the plaintiff. Troxell's widow had sued the defendant alleging that it had failed to provide proper safety appliances under the Pennsylvania statute. She lost, and brought a second action based on the Employers' Liability Act for the negligence of the defendant's servants in handling its cars. The first judgment was held not to be a bar. The case may, it is true, be distinguished on the ground taken by Mr. Justice Lurton, that the parties were not the same, because in the second suit, the widow sued as administratrix. Yet the decision goes much further, because the court clearly held that it was one cause of action not to furnish safe cars and another to use safe cars carelessly.

It is not perfectly certain that, had the plaintiff in the first action relied upon the Employers' Liability Act, as she might (because that includes defective appliances), the result would have been the same. That is indeed the case at bar, since the Jones Act incorporates the Employers' Liability Act. But if we ignore the difficulty arising from the distinction in the plaintiff's persona, it appears to us that there could be no logical differences. If the "cause of action," as the defendants at bar must maintain, consists of the injury and its origin from the defendant in one way or another, it can not be a distinction that in Troxell's case the defendant's faults were defined in two statutes, while in the case at bar they are to be found in one. The crux of the question rests not in the sources of the faults, but whether the law regards them as constitutive or only regulative of the basis of recovery. No doubt that in the end is a conventional question, but then so is most of the law. Perhaps it would be practically better to insist that a person injured by another should bring forward at one time all the reasons why he should recover. Yet there is a clear difference between injuring an employee because of inattention in the conduct of one's work and because of failing to furnish proper tools. The difference appears to us at least, as substantial as between injuring him intentionally and unintentionally. It does not follow because such diverse situations may be divided, that a plaintiff may sever by sepa-

rate suits different acts of negligence in the conduct of the work. It is enough for the present that the Supreme Court has countenanced the severance here necessary.

The exclusion of the roll in the admiralty suit was proper after what we have said. No fact actually adjudicated in the suit was material to the disposition of the action. As an estoppel it was irrelevant; as a bar it was bad.

Judgment affirmed.

Leaving for the moment a discussion of the *Troxell case,* it is submitted that other Circuit Courts of Appeals have a contrary rule as to the nature of the cause of action.

In *Columb* v. *Webster Manufacturing Company,* (C. C. A., 1st) 84 Fed. 592, the plaintiff had brought an action against his employer in a State court to recover for injuries suffered because he was thrown into the river by the sudden giving away of a trestle, which he alleged was not a safe place to work because carelessly and negligently constructed. After judgment for the defendant, he brought a second action in the Federal court alleging that the trestle fell and "owing to the neglect of the defendant to provide safe and suitable safeguards, instrumentalities, and protection for and in the performance of said work, and owing to the neglect of defendant to provide safe, suitable, and competent servants and agents to assist the plaintiff in the performance of said work, the plaintiff

was precipitated into the said river," and was injured.

Thus, the first ground was failure to provide a safe place to work. The second ground was negligence of fellow servants known to the defendant employer to be incompetent. (Mere incompetency, without negligent acts, would be *injuria absque damno.*) If the opinion of Judge Hand is correct, these were two different causes of action. Yet the Circuit Court of Appeals for the First Circuit, in a clear and well reasoned opinion which has been cited many times with approval, held that the first suit to recover for the injury was *res judicata* of all grounds of recovery.

In *Miller* v. *Spokane International Railway Co.* (C. C. A. 9th), 293 Fed. 748, both suits considered therein were brought under the same two statutes, the Locomotive Boiler Inspection Act and the Federal Employers' Liability Act. (The latter of these is incorporated by Section 33 of the Merchant Marine Act, which is in question in the instant case.)

In the first suit the plaintiff alleged a violation of one rule in that the cab apron was not roughened and did not fit smoothly. In the second he alleged a violation of a different rule, in that the apron was too short, and claimed that these were separate torts (293 Fed. 749). The court held that judgment in the first suit was *res judicata* of all grounds for recovery for the injury, saying, at p. 750:

> It is the personal injury that is the gist of the action, and although negligence alleged

may have been caused by the omission to comply with one of several specific requirements which it was the duty of the carrier to do, nevertheless plaintiff had but one cause of action, and having selected one defect of several upon which he might have based his action, he cannot now bring another suit based upon another specific defect. In *Stark* v. *Starr*, 94 U. S. 477, 24 L. Ed. 276, the court said: "It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible."

(2) We cannot find any solid ground upon which to except the present action from the principle stated. *Jenkins* v. *Atlantic Coast Line R. Co.*, (C. C.) 179 Fed. 535; *Clare* v. *New York & N. E. R. Co.*, 172 Mass. 211, 51 N. E. 1083.

The Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, provides, in Section 1:

> That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between

> the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Under the statute, failure on the part of a fellow servant to use due care toward the injured man, is, on the principle of *respondeat superior*, equally with defective appliances, an "omission to comply with one of several specific requirements which it was the duty of the carrier to do." The holding of the Circuit Court of Appeals for the Ninth Circuit in the *Miller* case that the plaintiff must allege in his suit for personal injury all of the various omissions to comply with the requirements of which he complains and that separate omissions do not constitute separate torts, is authority con-

trary to the holding in the instant case, that under the same statute (which has been incorporated in the Merchant Marine Act) failure to supply proper equipment gives rise to a different cause of action from negligent operation of the equipment, in both cases the injury being the same.

A large number of cases decided in the State courts likewise illustrate the same principle, namely, that a cause of action arises from the existence of a primary right in one person and a violation of that right by some delict on the part of another. Phillips had a primary right to bodily integrity. The delict was dropping the strongback on his ankle. Whatever was wrongful, be it negligence of the officers or anything else, made the dropping a delict. But the right plus its violation by the wrongful dropping, and not the cause of the dropping, is the cause of action.

Pavelka v. *St. Albert Society,* 82 Conn. 146.

Liimatainen v. *St. Louis River Dam & I. Co.,* 119 Minn. 238.

Beauregard v. *Webb Granite Co.,* 160 Mass. 201.

Emerson v. *Lewiston, etc., Ry.,* 116 Me. 61.

McKnight v. *Minneapolis Street Ry. Co.,* 127 Minn 207.

Beauregard v. *Webb Granite Co., supra,* was a suit under an employers' liability statute. Clause 1 of Section 1 of the statute made the employer liable for injuries from defects in machinery; clause

2 made the employer liable for negligence of the superintendent. The declaration was in two counts, alleging liability under both clauses. The plaintiff was compelled to elect between the counts by the trial court, which the Supreme Judicial Court held to be error, saying (p. 202):

> There are not two causes of action, but only one, and the two counts state the different legal reasons why under the statute the defendant may be liable in damages for the death of Clement Beauregard.

In *Pavelka* v. *St. Albert Society, supra,* the plaintiff brought successive suits claiming wrongful expulsion from a society. In the two suits different grounds of alleged wrongfulness were set up. The court held that the first suit made the matter *res judicata*, saying (p. 147):

> A right of action at law arises from the existence of a primary right in the plaintiff, and an invasion of that right by some delict on the part of the defendant. * * * The wrong complained of in both actions was the act of wrongful expulsion, and it was the same act in both cases. * * * Its wrongfulness might result from a sufficient single cause, or from a concurrence of causes each sufficient in itself. However this might be, the essential thing necessary to perfect a right of action would be the wrongful character of the act of expulsion. The conditions creating that character would be only incidental facts evidential of the principal fact

upon which alone the plaintiff could rely, and upon which in both cases he did rely.

In *Pomeroy on Civil Remedies* (3rd Ed.), sec. 455, it is said:

> These suggestions are necessary to guard against the mistake of supposing that a distinct cause of action will arise from each special subordinate right included in the general primary right held by the plaintiff, or from each particular act of wrong, which, in connection with others, may make up the composite but single delict complained of.

In *Columb* v. *Webster Manufacturing Co., supra,* the Circuit Court of Appeals for the First Circuit, at 84 Fed. 595, gave a conclusive reason against the decision which this Court is asked to review.

> Suppose the plaintiff had recovered in his New Hampshire case, upon such description of the negligence as he employed there; could he, by varying his description, and alleging additional negligence contributing to the same accident, have another recovery of damages for the same injury? If the affirmative is asserted, how are the damages to be divided? How much for the negligence as first described, and how much for the negligence set out in the second description? It is not believed that any one would seriously insist upon the right of a second recovery. If it is conceded, then, that under such circumstances a second recovery could not be had, for the reason that the full right of recovery was involved in the description of

> the defendant's negligence which the plaintiff employed, and in the trial, and therefore merged in the judgment favorable to the plaintiff, upon what logic can it be urged that the full right of recovery is not merged in a judgment unfavorable to the plaintiff, which is based upon the same allegations, the same trial, and the same proofs? A rule which would make the question whether a judgment is conclusive upon the plaintiff depend upon the question whether the judgment is for or against him, and make the result of the trial a conclusive estoppel upon both parties if favorable to the plaintiff, and otherwise not, would be a one-sided rule, discriminating in favor of the plaintiff, and a rule which would at once destroy the fundamental idea of estoppel by judgment.

So here, if Phillips had recovered upon a finding that the gear was unseaworthy, could he recover anew for the same injury upon a finding that the gear was negligently operated? If these are separate causes of action, surely he could. Yet, to state the question is to answer it in the negative.

II

Troxell v. Del., L. & W. R. R., 227 U. S. 434, does not support the decision of the lower court

In the *Troxell case*, a widow on behalf of herself and her minor children, sued for wrongful death under a Pennsylvania statute and recovered judgment (180 Fed. 871). This judgment was reversed by the Circuit Court of Appeals (183 Fed. 373)

upon the ground that the defendant's appliances were proper.

She then, as administratrix, sued under the Federal Employers' Liability Act. The lower court refused to strike off a plea of *res judicata* (185 Fed. 540); however, as appears from the record, the case was allowed to go to the jury, which brought in a verdict for the plaintiff. The Circuit Court of Appeals, although holding that the remedy under the Federal statute was exclusive, held that the matter had been made *res judicata* by the first suit. (200 Fed. 44.) Upon writ of error this Court reversed the Circuit Court of Appeals. (227 U. S. 434.) Mr. Justice Day, speaking for the Court, said at p. 441:

> In the Circuit Court of Appeals, however, it was held that the judgment in the first case was a bar as to the second proceeding because, in view of the decision of this court in *Second Employers' Liability cases,* 223 U. S. 1, an action of this kind for injury to one engaged in interstate commerce could only be maintained under the Federal Employers' Liability Act; and that, although the plaintiff undertook in the first action to abandon the charge as to the negligence of fellow servants and relied only on the want of a proper derailing switch on Albion Siding No. 2, nevertheless the first judgment was a bar because in the second action she was merely offering to prove additional facts which might have been proved in the first trial.

We think it is apparent from what we have said that the first case was prosecuted and tried on the theory that it involved a cause of action under the state law of Pennsylvania. It was so submitted to the jury, and they were told that they were not to consider the Federal law, but recovery should be based upon the right under the state act. If the Circuit Court of Appeals was right in its second decision that no action could have been maintained under the state law, in view of the Employers' Liability Act, the fact that the plaintiff attempted to recover under the law and pursued the supposed remedy until the court adjudged that it never had existed would not of itself preclude the subsequent pursuit of a remedy for relief to which in law she is entitled. *Wm. W. Bierce, Limited,* v. *Hutchins,* 205 U. S. 340; *Snow* v. *Alley,* 156 Massachusetts, 193, 195; *Water, Light & Gas Co.* v. *City of Hutchinson,* 90 C. C. A. 547, 551. Whether the plaintiff could properly have thus recovered is not the question now before the court. To work an estoppel the first proceeding and judgment must be a bar to the second one because it is a matter already adjudicated between the parties. The cause of action under the state law, if it could be prosecuted to recover for the wrongful death alleged in this case, was based upon a different theory of the right to recover than prevails under the Federal statute. Under the Pennsylvania law there could be no recovery for the negligence of

> the fellow servants of the deceased. This was the issue upon which the case was submitted at the second trial and a recovery had. Whether the plaintiff could recover under the Pennsylvania statute was not involved in the second action, and the plaintiff's right to recover because of the injury occasioned by the negligence of the fellow servants was not involved in or concluded by the first suit.
>
> Furthermore, it is well settled that to work an estoppel by judgment there must have been identity of parties in the two actions. * * * We think that under the ruling in the *Birch Case* there was not that identity of parties in the former action by the widow and the present case, properly brought by the administratrix under the Employers' Liability Act, which renders the former suit and judgment a bar to the present action.

Therefore, in the *Troxell case,* this Court decided three propositions:

(1) That pursuit of a nonexistent remedy did not make the matter *res judicata* when the existent remedy was pursued. This is not applicable to the instant case, because the same remedy was existent and was pursued in the Baltimore suit. *Panama Railroad Co.* v. *Johnson,* 264 U. S. 375. Error therein must be corrected by appeal, not by collateral attack.

(2) That the plaintiff was not estopped by the judgment in the first suit as to matters not tried because not admissible therein. In the first suit

under the Pennsylvania statute, there could be no recovery for injury by negligence of the fellow servants, so that evidence thereof would not show a ground of liability. Under the Federal statute, there could be recovery for injury by negligence of the fellow servants, and, since the first suit had not concluded plaintiff's right of action, the plaintiff was not estopped to show negligence, under the familiar rule of this Court in *Cromwell* v. *County of Sac,* 94 U. S. 351. This proposition is not applicable to the instant case, because *Panama Railroad Co.* v. *Johnson,* 264 U. S. 375, shows that there could have been recovery for injury by negligence of the officers, so that such negligence was an admissible issue in the first suit. Therefore Phillips could not bring a second suit. *Columb* v. *Webster Manufacturing Co., supra; Miller* v. *Spokane International Railway Co., supra.*

(3) That there was a difference in parties between the widow in her own right and the widow as administratrix. Such difference in parties does not exist in the instant case. It involves two pursuits of the same remedy, for the same wrong, between the same parties, successively brought in two different courts.

However, it is respectfully submitted that there is no warrant in the *Troxell case* for saying, as Judge Hand does, that this Court held it to be one cause of action not to furnish safe cars and another to use safe cars carelessly. In the *Troxell case* the

plaintiff thought she had two remedies; she pursued one until it proved to be nonexistent. As to matters not in issue in the vain pursuit, the plaintiff was not estopped in her only existent remedy. This Court did not say, and has not said, that under the same statute there could be two causes of action for the same injury, and *Miller* v. *Spokane International Railway Co., supra,* under the statute, and *Columb* v. *Webster Manufacturing Co., supra,* at common law, decide that there is only one cause of action.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted.

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CHAUNCEY G. PARKER,
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JANUARY, 1926.

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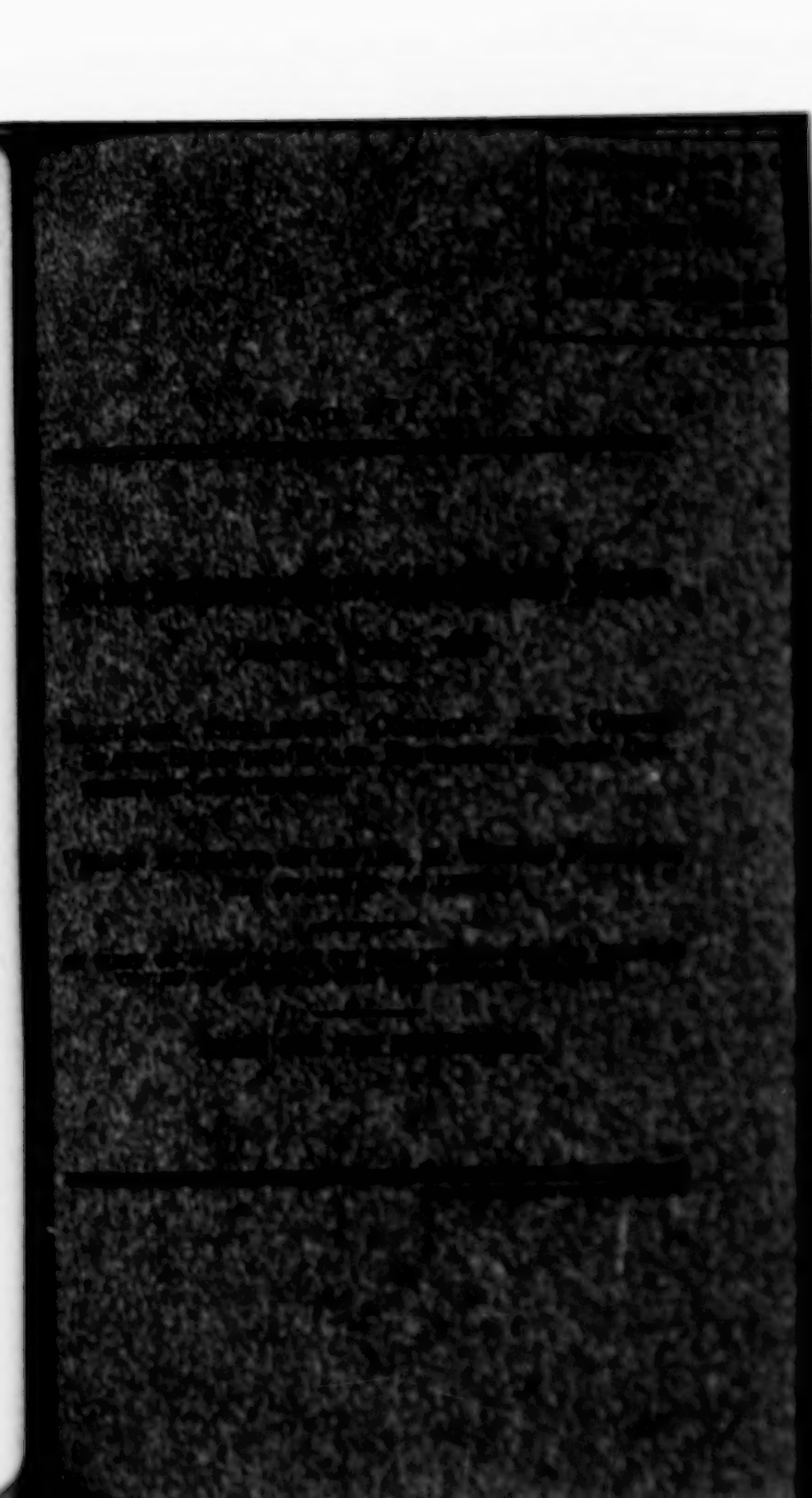

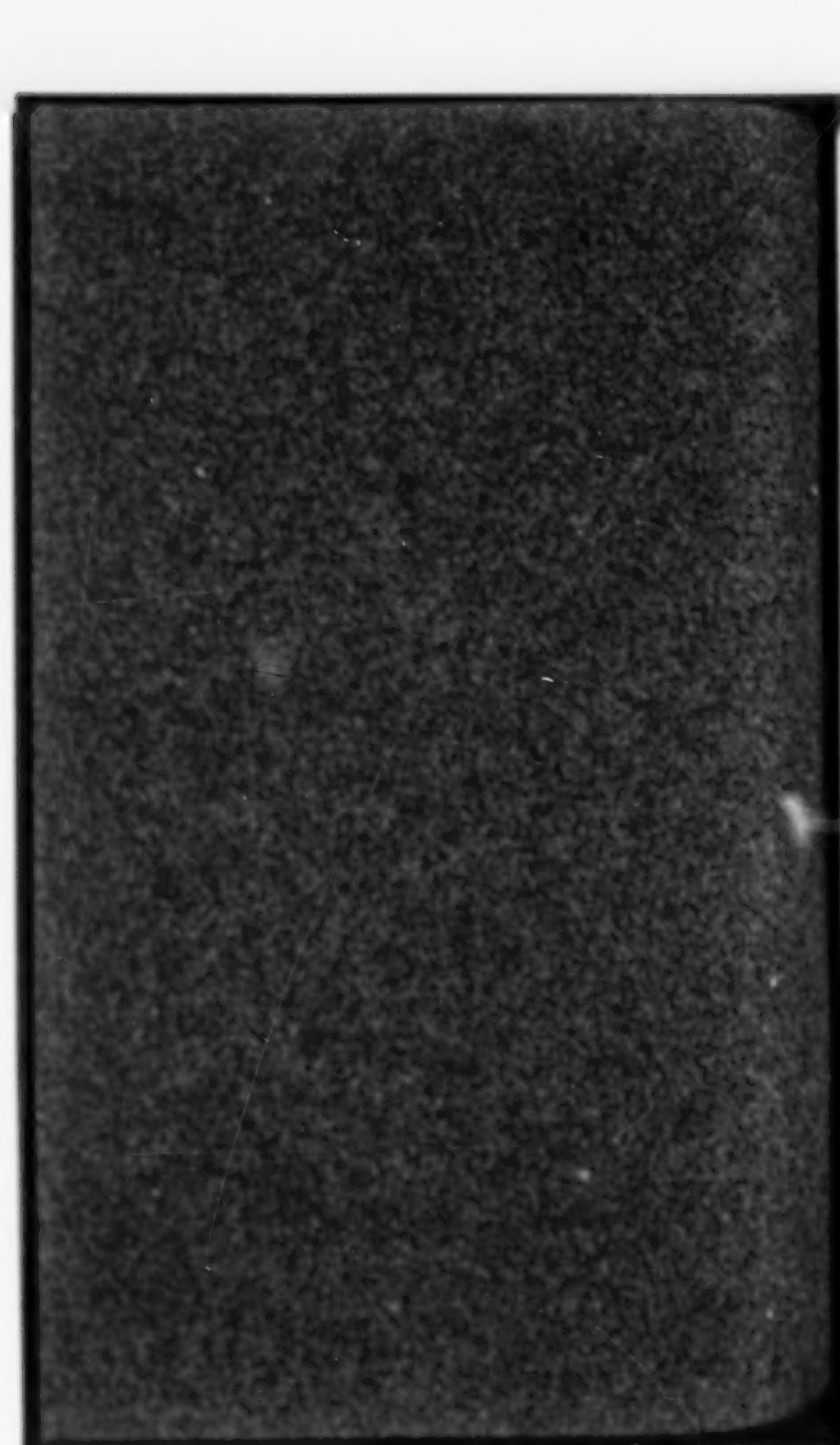

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 271

BALTIMORE STEAMSHIP COMPANY AND UNITED States Shipping Board Emergency Fleet Corporation, petitioners

v.

VERNON PHILLIPS, AN INFANT, BY VERNON PHILLIPS, his guardian ad litem

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

OPINION

The opinion of the Circuit Court of Appeals (R. 117) is reported in 9 F. (2d) 902. The opinions of the District Court are not reported, but appear on pages 27 and 35 of the record.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 16, 1925. (R. 122.) The petition for certiorari was filed on January 20, 1926, and granted on March 8, 1926. (R. 122.)

THE QUESTION

This case presents the single question of whether a final judgment in admiralty in a proceeding in which the libelant claimed damages for personal injuries, or in the alternative claimed maintenance and cure, is a bar to a subsequent suit at law for the same injuries, based on a theory of liability which either was or could have been urged in the admiralty suit.

STATEMENT

This petition involves a situation where an injured seaman instead of applying for and receiving compensation under the Federal Employees' Compensation Act of September 7, 1916 (c. 458, 39 Stat. 742), to which he was entitled (34 Op. Atty. Gen. 363), brought suit to recover for personal injury. After judgment against him, from which no appeal was taken, he brought a second suit to recover for the same injury. The courts below refused to sustain a plea of *res judicata,* the Circuit Court of Appeals deciding that the different allegations of fault in the two suits set forth two different causes of action for the same injury.

On July 24, 1921, Vernon Phillips (Philipps), a seaman on board the steamship *West Cape,* was working in hold No. 1 of the vessel. While dunnage was being removed from the hold, a strongback (or beam) fell from the hatch and struck Phillips' left ankle, fracturing it.

The statute which governs the right of Phillips to recover indemnity for his injury is Section 20 of the Act of March 4, 1915 (c. 153, 38 Stat. 1164, 1185) as amended by Section 33 of the Act of June 5, 1920 (c. 250, 41 Stat. 988, 1007) which reads as follows:

> SECTION 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; * * *.

This Court considered and explained the statute in *Panama Railroad Co.* v. *Johnson* (264 U. S. 375).

Phillips filed a libel in admiralty in the United States District Court for the District of Maryland, against the United States of America, the United States Shipping Board Emergency Fleet Corporation, and the Baltimore Steamship Company. (R. 101.) He set forth his injury, alleging (R. 101)—

> that his injuries were caused by the negligence of the respondents in failing to provide him with a safe place in which to do the work required of him and in failing to use reasonable care to avoid striking him, and to the unseaworthiness and insufficiency of the gear and tackle employed on board said vessel,

and claimed $15,000 indemnity. By amendment he alleged (R. 103)—

> that the negligence claimed consists in the failure of the respondent, the United States of America, to provide a cleat or socket of the proper design and sufficient strength to support the strong back when one end of it was negligently knocked out of place by a load of dunnage being hoisted from the hold, further the officers of the steamship *West Cape* were incompetent, further that the respondents owe a special duty to Vernon L. Phillips, Jr., because of his youth and inexperience. And libelant claims, in the event that negligence is not established, for wages, maintenance and cure.

Phillips testified at the trial of that case. (R. 58, et seq.) Judge Rose filed an opinion (286 Fed. 631) finding that libelant's ankle had been fractured and ultimately his left leg had been amputated above the knee; that there was nothing whatever the matter with the construction or design of the cleat or socket which held the strongback; that the injury was caused by the negligent way in which the dunnage was taken out of the hold; but that the record did not show lack of due care in selecting competent officers. He concluded his opinion by saying (p. 633):

> In this case, one cannot help regretting that under the authorities it is not possible to hold somebody for the needless and irreparable injury done this youth.

> As the decisions stand, however, all that may be awarded him is the cost of his maintenance and cure, which upon the testimony the parties agree amounts to $500.

A decree was entered on February 19, 1923, reciting (R. 100):

> This cause having come on for hearing, on the pleadings and proofs, and having been argued and submitted, due consideration having been had, it is now this 19th day of February, 1923,
>
> Ordered, adjudged and decreed, by the District Court of the United States for the District of Maryland, that the respondents are not liable to the libelant for full indemnity, but only for maintenance and cure, which is hereby fixed at five hundred dollars, and which the respondents are to pay to the libelant * * *.

No appeal was taken from this decree and it was marked "satisfied" on March 21, 1923. (R. 106.)

On May 22, 1923, before the expiration of the time during which an appeal might have been taken from the Maryland decree, Phillips started an action at law in the Supreme Court of the State of New York against the petitioners, the Baltimore Steamship Company and the United States Shipping Board Emergency Fleet Corporation, who were two of the respondents in the admiralty suit. The third respondent, the United States of America, was not joined. (R. 2.) In his complaint

Phillips alleged, among other things (R. 3, Article 12):

> That the injuries to the plaintiff were directly caused by the negligence of the defendants and of the officers and their seamen in their employ in their negligent and reckless control and operation of said vessel and of said winch and appliances on the said vessel and in their operation thereof, in their disregard of the rights, presence, and safety of the plaintiff, and in their failure to give warning to the plaintiff of the impending danger.

Indemnity was claimed in the sum of $100,000. (R. 4.) This case was removed to the District Court of the United States for the Eastern District of New York. (R. 5, 6.) Answers were filed by the petitioners setting up, among other defenses, that of *res judicata* based upon the decree in the Maryland suit. (R. 8, 11.)

Upon the stipulation of counsel the plea of *res judicata* was argued before trial. On January 15, 1924, Judge Inch handed down a decision holding that the Maryland decree was a bar. (R. 27.) This he reversed on rehearing by an opinion dated May 15, 1924. (R. 35.) The case was then tried upon substantially the same proofs as were before Judge Rose in Maryland. The record in the Maryland suit was offered in evidence by the petitioners and rejected. Exceptions were duly taken. (R. 82 et seq.) The case was allowed to go to the jury, which returned a verdict for the plaintiff against

the petitioners in the sum of $40,000. The case was then taken to the Circuit Court of Appeals upon writ of error and that court affirmed the decision of the District Court. The Court of Appeals held that a cause of action for injuries due to unseaworthy gear was different and distinct from a cause of action for the same injuries due to the negligent use of seaworthy gear.

OPINIONS OF THE LOWER COURTS

In his first opinion Judge Inch held (R. 28):

> It is plain from a reading of the papers both in the admiralty action and in this present action that the same facts were relied upon to show liability to plaintiff on the part of these defendants. The cause of action in both actions is to recover for personal injuries due to neglect of duty by defendants. The word "indemnity" has no significance so far as the point now under consideration is concerned.
>
> * * * * *
>
> If he sued in admiralty he would not be entitled to recover an indemnity for the negligence of the master or any other member of the crew and all the members of the crew exclusive possibly of the master were between themselves fellow servants.
>
> This would not of course have affected his right to recover, as he did for maintenance and cure.
>
> The same rule as to fellow servants would have existed in his common law action.

The second opinion of May 15, 1924, was written after this Court held in *Panama R. R. Co.* v. *Johnson* (264 U. S. 375) that Section 33 of the Merchant Marine Act of 1920 had modified the maritime law and that the rights given by that law as modified could be enforced either in courts of admiralty or in courts of common law. Judge Inch felt that Judge Rose had committed error in his opinion, and apparently for that reason held the Maryland decree was not a bar, saying (R. 38, 39):

> While, therefore, the order complained of is right if plaintiff had been allowed to litigate in his admiralty action this question of negligence such decree is a bar only as to such issues as were litigated or which plaintiff could have litigated.
>
> * * * * *
>
> From now on there can be no danger of two suits, one in admiralty for maintenance and cure, unseaworthiness of the ship, etc., and one at law for negligence on the part of the master and crew, for henceforth the trial court in admiralty can award the proper damages and amount, or at law submit same to a jury.

In discussing this question Judge Learned Hand, speaking for the Circuit Court of Appeals, said (R. 120):

> In the case of a suit for personal injuries, it is indeed possible to regard the action as based alone upon the plaintiff's bodily injury. So viewed, a battery would be the

same cause of action as an action on the case for unintentional injury. The question would be irrelevant whether the injury, in fact caused by the defendant, was intentional or careless. The material fact would be the injury itself and its causation by the defendant. History alone forbids such a view, though eventually the law may assume that form, 8 Harv. Law Review, 1.

Nevertheless, among actions on the case it would still be possible to adopt the theory, somewhat mutilated to be sure, but consistent so far as it went. Confined to acts which were unintentional, the law might regard the injury and its causation as alone constituting the cause of action, treating as a variant, immaterial in the definition of the species, the kind of neglect which cut off the defendant's excuse that the injury was not intended. So viewed, it would be the same cause of action whether the defendant had installed unseaworthy gear, or had been careless in the use of seaworthy gear.

But a defendant's liability in such cases might depend upon a quite opposite notion; that is, that he owed a duty of care in the use of such gear as he installed and another duty to install seaworthy gear. In that view the cause of action would differ according as the plaintiff charged him with one or the other default, and a judgment on the one would not be a bar to the other. We concede that the law has not come to a definite conclusion between the two theories, and cases may be

found taking either view, but obviously we are to be controlled by that taken by the Supreme Court so far as it has declared itself.

The nearest case is *Troxell* v. *D. L. & W. R. R. Co.*, 227 U. S. 434, which, we think, favors the plaintiff. Troxell's widow had sued the defendant alleging that it had failed to provide proper safety appliances under the Pennsylvania statute. She lost, and brought a second action based on the Employers' Liability Act for the negligence of the defendant's servants in handling its cars. The first judgment was held not to be a bar. The case may, it is true, be distinguished on the ground taken by Mr. Justice Lurton, that the parties were not the same, because in the second suit, the widow sued as administratrix. Yet the decision goes much further, because the court clearly held that it was one cause of action not to furnish safe cars and another to use safe cars carelessly.

It is not perfectly certain that, had the plaintiff in the first action relied upon the Employers' Liability Act, as she might (because that includes defective appliances), the result would have been the same. That is indeed the case at bar, since the Jones Act incorporates the Employers' Liability Act. But if we ignore the difficulty arising from the distinction in the plaintiff's persona, it appears to us that there could be no logical differences. If the "cause of action," as the

defendants at bar must maintain, consists of the injury and its origin from the defendant in one way or another, it can not be a distinction that in Troxwell's case the defendant's faults were defined in two statutes, while in the case at bar they are to be found in one. The crux of the question rests not in the sources of the faults, but whether the law regards them as constitutive or only regulative of the basis of recovery. No doubt that in the end is a conventional question, but then so is most of the law. Perhaps it would be practically better to insist that a person injured by another should bring forward at one time all the reasons why he should recover. Yet there is a clear difference between injuring an employee because of inattention in the conduct of one's work and because of failing to furnish proper tools. The difference appears to us at least, as substantial as between injuring him intentionally and unintentionally. It does not follow because such diverse situations may be divided, that a plaintiff may sever by separate suits different acts of negligence in the conduct of the work. It is enough for the present that the Supreme Court has countenanced the severance how necessary.

The exclusion of the roll in the admiralty suit was proper after what we have said. No fact actually adjudicated in the suit was material to the disposition of the action. As an estoppel it was irrelevant; as a bar it was bad.

SPECIFICATION OF ERROR TO BE URGED

The courts below erred in failing to sustain the plea of res judicata.

SUMMARY OF THE ARGUMENT

Whatever rights Phillips had growing out of his injury were given to him by the general maritime law as amended by statute. These rights could have been enforced either in an admiralty or common law suit. In either case his substantive rights would have been the same. In the suit in the U. S. District Court in Maryland negligence in the operation of seaworthy gear could have been urged—if it was not—just as well as in this case. That court decided as a matter of substantive law that such negligence did not give rise to a cause of action. If this was erroneous, it should have been corrected on appeal and not by collateral attack.

The gist of the action was the wrongful dropping of the stowhook on Phillips' ankle. There was only one cause of action no matter how many negligent acts or omissions to perform duties make the dropping wrongful. If the wrongful dropping caused both by improper gear and its negligent operation give rise to two causes of action, there is no reason why there should not be as many causes of action as there are acts of negligence. Such a rule would tend to multiply the number of suits arising from a single injury.

The rule of this Court as laid down in *Stark* v. *Shaw* (94 U. S. 477, 485) and other cases is that

a plaintiff may not try his case piecemeal but must present in one suit all the grounds of liability on which he expects to recover. The Maryland decree is therefore a bar to the cause of action arising out of injuries inflicted by the wrongful dropping of the strongback. It is an adjudication of all the theories of liability which were or could have been urged in that suit.

ARGUMENT

THE MARYLAND ADMIRALTY DECREE WAS AN ADJUDICATION OF ALL PHILLIPS' RIGHTS GROWING OUT OF THE INJURY AND IS A BAR TO THE NEW YORK SUITS

I

IN THE MARYLAND SUIT THE ISSUE OF NEGLIGENCE IN THE OPERATION OF THE WINCH WAS OPEN TO PHILLIPS AS A GROUND OF RECOVERY

Phillips' injury occurred on board the *West Cape* while that vessel was on the high seas. Whatever rights he had were given him by the maritime law. That law determined his substantive rights whether he sought relief in admiralty or at law. (*Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372.)

The rule under the general maritime law (*The Osceola*, 189 U. S. 158, 175) was:

> That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.

This rule of the general maritime law was changed prior to the occurrence involved in this case by Section 33 of the Merchant Marine Act of 1920 (41 Stat. 1007). Since the passage of that Act a seaman has been entitled to an indemnity for injuries caused by negligence of fellow servants. (*Panama R. R. Co.* v. *Johnson*, 264 U. S. 375; *Panama R. R. Co.* v. *Vasquez*, 271 U. S. 557.)

The rule is now the same no matter what the forum. This Court said in *Engel* v. *Davenport* (271 U. S. 33, 37):

> It is clear that the state courts have jurisdiction concurrently with the federal courts, to enforce the right of action established by the Merchant Marine Act as a part of the maritime law.

The same theory of liability could have been urged in the Maryland suit that was urged in this suit. The Circuit Court of Appeals did not say that the District Court of Maryland could not have granted relief for negligence in the operation of a proper winch, but did hold, as it construed the pleadings, that such negligence had not been alleged. Judge Rose based his decision not on the narrow ground that negligence in the operation of the winch had not been alleged, but on his understanding of the substantive maritime law. His concluding words (286 Fed. 631, 633) indicate that if he had been merely prevented from giving relief because the negligence in the operation of the winch was not alleged he would have allowed an amendment.

II

PHILLIPS HAD ONLY ONE CAUSE OF ACTION AGAINST THE PETITIONERS FOR INJURIES SUFFERED FROM THE WRONGFUL DROPPING OF THE STRONGBACK UPON HIS ANKLE

The gist of the cause of action was the wrongful dropping of the strongback. There may be a number of reasons why the dropping was wrongful. There may have been negligence of the master, negligence of the mate, negligence of the boatswain, or of other officers or of members of the crew. There may have been a defective winch, a defective rope, or other defective tackle. All these go to establish the ultimate proposition that the dropping was wrongful and that the wrongful dropping injured the plaintiff. If he were given a cause of action for each act of negligence which contributed to make the dropping wrongful or for each omission of a duty to furnish proper gear which made the dropping wrongful, there would be no end of litigation arising out of a single injury. It may be urged that the Circuit Court of Appeals did not go that far, but merely says there were two groups of causes which contributed to make the dropping wrongful, each of which would create a cause of action; that is, one for failure to provide seaworthy gear and another for the negligent operation of proper gear. But even a division into two classes would unduly prolong litigation and produce multiplicity of suits.

This Court in *Chicago, Rock Island & Pacific Ry. Co.* v. *Schendel* (270 U. S. 611) stated broadly the exact rule to be applied in a case of this character (though the precise question here presented was not decided), saying, at p. 617:

> Hope's death as the result of the negligence of the railroad company gave rise to a single cause of action, to be enforced directly by the widow, under the state law, or in the name of the personal representative, for the sole benefit of the widow, under the federal law, depending upon the character of the commerce in which the deceased and the company were engaged at the time of the accident.

In *Columb* v. *Webster Manufacturing Co.* (C. C. A. 1st), 84 Fed. 592, the plaintiff had brought an action against his employer in a State court to recover for injuries suffered because he was thrown into the river by the sudden giving away of a trestle, which he alleged was not a safe place to work because carelessly and negligently constructed. After judgment for the defendant, he brought a second action in the Federal court alleging that the trestle fell and "owing to the neglect of the defendant to provide safe and suitable safeguards, instrumentalities, and protection for and in the performance of said work, and owing to the neglect of defendant to provide safe, suitable, and competent servants and agents to assist the plaintiff in the perform-

ance of said work, the plaintiff was precipitated into the said river," and was injured.

Thus the first ground was failure to provide a safe place to work. The second ground was negligence of fellow servants known to the defendant employer to be incompetent. Mere incompetency, without negligent acts causing damage, would be *injuria absque damno*. "My Lords, the *Paludina* is not liable for mere negligence, but only for negligence causing damage." (*The Paludina*, H. L., 1926, 25 Ll. L. R. 281, 285.) If the opinion of Judge Hand is correct, these were two different causes of action. Yet the Circuit Court of Appeals for the First Circuit, in a clear and well-reasoned opinion which has been cited many times with approval, held that the first suit to recover for the injury was *res judicata* of all grounds of recovery.

In *Miller* v. *Spokane International Ry. Co.* (C. C. A. 9th), 293 Fed. 748, both suits considered therein were brought under the same two statutes, the Locomotive Boiler Inspection Act and the Federal Employers' Liability Act. (The latter of these is incorporated by Section 33 of the Merchant Marine Act, which is in question in the instant case.)

In the first suit the plaintiff alleged a violation of one rule in that the cab apron was not roughened and did not fit smoothly. In the second he alleged a violation of a different rule, in that the apron was too short, and claimed that these were separate torts. (293 Fed. 749.) The court held that judg-

ment in the first suit was *res judicata* of all grounds for recovery for the injury, saying, at page 750:

> It is the personal injury that is the gist of the action, and although negligence alleged may have been caused by the omission to comply with one of several specific requirements which it was the duty of the carrier to do, nevertheless plaintiff had but one cause of action, and having selected one defect of several upon which he might have based his action, he can not now bring another suit based upon another specific defect. In *Stark* v. *Starr,* 94 U. S. 477, 24 L. Ed. 276, the court said: "It is undoubtedly a settled principle that a party seeking to enforce a claim legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible." We can not find any solid ground upon which to except the present action from the principle stated. *Jenkins* v. *Atlantic Coast Line R. Co.* (C. C.), 179 Fed. 535; *Clare* v. *New York & N. E. R. Co.,* 172 Mass. 211, 51 N. E. 1083.

The Federal Employers' Liability Act of April 22, 1908 (c. 149, 35 Stat. 65), provides, in Section 1:

> That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Under the statute, on the principle of *respondeat superior,* failure on the part of a fellow servant to use due care toward the injured man, is equally with defective appliances, an "omission to comply with one of several specific requirements which it was the duty of the carrier to do."

Thus the holding of the Circuit Court of Appeals for the Ninth Circuit in the *Miller case*—that the

plaintiff must allege in his suit for personal injury all of the various omissions to comply with the requirements of the statute of which he complains, and that separate omissions do not constitute separate torts—is a square holding that under the same statute which has been incorporated in the Merchant Marine Act failure to supply proper equipment and negligent operation of the equipment are both merely wrongful acts which create, together with the injury, the cause of action, but which create only one cause of action for the same injury.

A large number of cases decided in the State courts likewise illustrate the same principle, namely, that a cause of action arises from the existence of a primary right in one person and a violation of that right by some delict on the part of another. Phillips had a primary right to bodily integrity. The delict was dropping the strongback on his ankle. Whatever was wrongful, be it negligence of the officers or anything else, made the dropping a delict. But the right plus its violation by the wrongful dropping, and not the cause of the dropping, is the cause of action.

In *Pavelka* v. *St. Albert Society* (82 Conn. 146) the plaintiff brought successive suits claiming wrongful expulsion from a society. In the two suits different grounds of alleged wrongfulness were set up. The court held that the first suit made the matter *res judicata,* saying (p. 147):

> A right of action at law arises from the existence of a primary right in the plaintiff, and an invasion of that right by some delict on the part of the defendant. * * * The wrong complained of in both actions was the act of wrongful expulsion, and it was the same act in both cases. * * * Its wrongfulness might result from a sufficient single cause, or from a concurrence of causes each sufficient in itself. However this might be, the essential thing necessary to perfect a right of action would be the wrongful character of the act of expulsion. The conditions creating that character would be only incidental facts evidential of the principal fact upon which alone the plaintiff could rely, and upon which in both cases he did rely.

Beauregard v. *Webb Granite Co.* (160 Mass. 201), was a suit under an employers' liability statute. Clause 1 of Section 1 of the statute made the employer liable for injuries from defects in machinery; clause 2 made the employer liable for negligence of the superintendent. The declaration was in two counts, alleging liability under both clauses. The plaintiff was compelled to elect between the counts by the trial court, which the Supreme Judicial Court held to be error, saying (p. 202):

> There are not two causes of action, but only one, and the two counts state the different legal reasons why under the statute the defendant may be liable in damages for the death of Clement Beauregard.

In *Emerson* v. *Street Railway* (116 Maine, 61), the court held (p. 67):

> In the case at bar we have a clear instance of "res judicata." The essence of the charges in both writs is that the defendant negligently and carelessly discharged its ultimate duty to the plaintiff, which was to afford her safe egress to the street. Negligently starting the car as she was alighting, and negligently allowing her to step from the car into an open trench, dug by the defendant and by it allowed to remain open, unguarded, and unlighted, are both violations of one and the same duty. Defendant was guilty of but one tort, and there was but one cause of action, and there having been a judgment on the merits in the prior action, it is a bar, not only to the issues that were tried, but also as to all that might have been tried.

In *McKnight* v. *Minneapolis St. Ry. Co.* (127 Minn. 207) the court said:

> In suits based upon negligence, the cause of action is the violation of the ultimate duty to exercise due care that another may not suffer injury. In the instant case plaintiff was a passenger upon defendant's street car, and it was the duty of defendant to afford her safe egress therefrom. Her claim for damages is grounded upon the charge that defendant violated such duty. The violation of this duty constitutes her cause of action. In the first suit she charged that defendant

> violated this duty by suddenly starting the car while she was in the act of alighting. In the present suit she charges that defendant violated such duty by providing a defective step for her to use in descending from the car. Both suits are based upon the violation of the ultimate duty to afford safe egress from the car. The second suit "presents no new cause of action, but only new grounds for relief upon the same cause of action," and under the authorities cited is barred by the judgment in the former suit.

In *Payne* v. *New York, S. & W. R. Co.* (201 N. Y. 436, at 441) the court said:

> [The complaint] sets forth facts which render the defendant liable at common law; it contains other allegations which tend to support a claim under the Employers' Liability Act which is pleaded; and it pleads still other averments which bring the case within the rule of the Federal statute. Suppose the plaintiff proves them all. Does that establish three distinct rights in the plaintiff, or three independent wrongs against the defendant, or support three separate recoveries? Obviously there is but one primary right, one primary wrong, and one liability.

The Circuit Court of Appeals based its decision on *Troxell* v. *Del., L. & W. R. R. Co.* (227 U. S. 434). That case involved a second suit for the same death. In the first Troxell suit recovery was sought under the Pennsylvania Wrongful Death Statute of April 15, 1851 (P. L. 674). It was urged in the District

Court (180 Fed. 871) that the Federal Employers' Liability Act was exclusive, but the court held that the State Act could still apply at least to injuries received by men engaged in intrastate commerce. The Circuit Court of Appeals reversed (183 Fed. 373) for the reason that the facts proved did not constitute a cause of action under the Pennsylvania statute, and said that it was unnecessary to decide the other points raised.

The second suit was based on the Federal Employers' Liability Act and recovery was allowed by this Court. Only one cause of action arose out of Troxell's death. If he had been engaged in intrastate commerce the State Act would apply. If he had been engaged in interstate commerce the Federal Act would apply. Whether he was engaged in intrastate or interstate commerce was not decided in the first suit. It was necessarily decided in the second suit that he was engaged in interstate commerce, otherwise no recovery could have been allowed under the Federal statute. In the first suit the plaintiff pursued a nonexisting cause of action. This did not bar her from later pursuing the existing cause of action. The Court said (p. 442):

> If the Circuit Court of Appeals was right in its second decision that no action could have been maintained under the state law, in view of the Employers' Liability Act, the fact that the plaintiff attempted to recover under that law and pursued the supposed

> remedy until the court adjudged that it never had existed would not of itself preclude the subsequent pursuit of a remedy for relief to which in law she is entitled.

Chicago, Rock Island & Pacific R. R. Co. v. Schendel (270 U. S. 611) presented a parallel situation. There it was held that if Hope (the deceased) had been engaged in interstate commerce he had a cause of action under the State law; if engaged in interstate commerce, a cause of action under the Federal statute. The Court said (p. 626):

> It is urged in behalf of respondent, that the federal act is supreme and supersedes all state laws in respect of employers' liability in interstate commerce. That is quite true; but it does not advance the solution of the point in dispute, since it is equally true that, in respect of such liability arising in interstate commerce, the state law is supreme.

And at p. 627:

> Hope's death as the result of the negligence of the railroad company gave rise to a single cause of action, to be enforced directly by the widow, under the state law, or in the name of the personal representative, for the sole benefit of the widow, under the federal law, depending upon the character of the commerce in which the deceased and the company were engaged at the time of the accident.

Here Phillips' injury gave rise to a single cause of action determined by the maritime law as modified by the Federal Employers' Liability Act, which was incorporated into the maritime law by Section 33 of the Merchant Marine Act of 1920. The suit in the District Court for the District of Maryland was brought on this cause of action.

If the suit for injury from negligence is on a different cause of action from a suit for the same injury from unseaworthiness then plaintiff would be entitled not only to two suits, but to two recoveries.

A recovery on one cause of action is not a bar to recovery by the same plaintiff against the same defendant on any other causes of action which he may have. It follows that if Mr. Phillips had two causes of action against the petitioners, one for the injury caused by unseaworthiness, and the second for the same injury caused by negligence, then he was legally entitled, first to sue the petitioners for his injury and prove unseaworthiness and recover, and to sue the petitioners a second time for the same injury and prove negligence, and also recover a second time. This consideration alone is a sufficient reason for holding that there was only one cause of action and that the wrongful acts were merely the delict upon which recovery might be based. This consideration is presented in *Columb* v. *Webster Manufacturing Co.* (84 Fed. 592, at page 595):

Suppose the plaintiff had recovered in his New Hampshire case, upon such description of the negligence as he employed there; could he, by varying his description, and alleging additional negligence contributing to the same accident, have another recovery of damages for the same injury? If the affirmative is asserted, how are the damages to be divided? How much for the negligence as first described, and how much for the negligence set out in the second description? It is not believed that any one would seriously insist upon the right of a second recovery. If it is conceded, then, that under such circumstances a second recovery could not be had, for the reason that the full right of recovery was involved in the description of the defendant's negligence which the plaintiff employed, and in the trial, and therefore merged in the judgment favorable to the plaintiff, upon what logic can it be urged that the full right of recovery is not merged in a judgment unfavorable to the plaintiff, which is based upon the same allegations, the same trial, and the same proofs? A rule which would make the question whether a judgment is conclusive upon the plaintiff depend upon the question whether the judgment is for or against him, and make the result of the trial a conclusive estoppel upon both parties if favorable to the plaintiff, and otherwise not, would be a one-sided rule, discriminating in

favor of the plaintiff, and a rule which would at once destroy the fundamental idea of estoppel by judgment.

III

A JUDGMENT IN ONE SUIT IS A BAR TO ANOTHER SUIT ON THE SAME CAUSE OF ACTION IN FAVOR OF THE SAME PLAINTIFF AGAINST THE SAME DEFENDANTS, ALTHOUGH A NEW REASON FOR LIABILITY IS URGED

In *Stark* v. *Starr* (94 U. S. 477, 485) the Court said:

> It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such practice were permissible.

And in *United States* v. *California & Oregon Land Co.* (192 U. S. 355, 358):

> The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way of for-

feiture. Now it seeks the same conclusion by a different means, that is to say, by evidence that the lands originally were excepted from the grant. But in this, as in the former suit, it seeks to establish its own title to the fee.

It may be the law in Scotland that a judgment is not a bar to a second attempt to reach the same result by a different *medium concludendi*. *Phosphate Sewage Co.* v. *Molleson*, 5 Ct. of Sess. Cas. (4th Ser.) 1125, 1139; although in the same case on appeal Lord Blackburn seemed to doubt the proposition if the facts were known before. *S. C.* 4 Apps. Cas. 801, 820. But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He can not even split up his claim, *Fetter* v. *Beale*, 1 Salk. 11; *Trask* v. *Hartford & New Haven Railroad*, 2 Allen, 331; Freeman, Judgments, 4th ed. Secs. 238, 241; and, *a fortiori*, he cannot divide the grounds of recovery.

CONCLUSION

It is submitted that Phillips had only one cause of action, that this was given to him by the general maritime law as modified by statute, that in the Maryland suit this cause of action was before the court and every reason supporting liability which was urged in the lower courts in this case could have been urged there, and that this suit is on the

same cause of action, and that it is barred by the Maryland decree, and that for these reasons judgment should be reversed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
CHAUNCEY G. PARKER,
General Counsel, United States Shipping Board.
ARTHUR M. BOAL,
Admiralty Counsel,
United States Shipping Board.
HAROLD F. BIRNBAUM,
Special Assistant to the United States Attorney.

MARCH, 1927.

FEB 4 1926
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1925

No. [redacted]271

BALTIMORE STEAMSHIP COMPANY and UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION

Petitioners

against

VERNON PHILLIPS, an infant, by VERNON PHILLIPS, his Guardian *ad Litem*

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDGAR J. TREACY
Solicitor for Respondent

Appeal Printing Company, 82 Thomas Street, New York City

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. ——

BALTIMORE STEAMSHIP COMPANY and UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, Petitioners,

v.

VERNON PHILLIPS, an Infant, by VERNON PHILLIPS, his Guardian, *ad litem.*

BRIEF IN OPPOSITION TO PETITION.

Statement of the Case.

This case has nothing to do with the Federal Employees' Compensation Act. The plaintiff was not a Federal employee. He was a member of the crew of the *West Cape*, a cargo vessel operated by the defendants (R., 100). At the time he signed articles he was eighteen years old and was going to school and working in vacation (R., 101). Although he had never been to sea before, he was put down on the articles as an able bodied seaman (R., 102). The ship left Baltimore in May, 1921, carrying grain and coal for British ports. Number 1 hold and Number 5 hold were fitted with shifting boards and after the grain had been discharged, the shifting boards were left in, and water

taken into the holds for ballast (R., 136). On the voyage home, the rolling of the water ballast knocked down and splintered the shifting boards in these holds. On Sunday, July 24, 1921, when the ship was within a day or two of her home port, the deck crew was set to work taking out the broken lumber from Number 1 hold (R., 139). One section of the hatch was taken off and one strongback was taken out at the main deck and one or two at the 'tween deck hatch; the rest of the strongbacks were allowed to remain in (R., 141). The dunnage was hoisted by a winch on the port side of Number 1 hatch, the second officer acting as winchman (R., 140). After the hoisting had commenced the plaintiff was ordered into Number 1 hold to clean the bilges (R., 105). While he was scooping the grain out of the starboard bilges, the wire fall which had been led into the forward part of Number 1 hold, fouled a strongback, and as the winchman continued to hoist away, the strongback was lifted out of its sockets and thrown into the hold upon the plaintiff (R., 144). His left leg was mangled so badly that it was later amputated above the knee (R., 108).

Action was brought in the Supreme Court of the State of New York, Nassau County, and removed to the United States District Court for the Eastern District of New York where the plaintiff recovered a verdict for Forty Thousand Dollars (R., 170). The judgment entered thereon was affirmed by the Circuit Court of Appeals for the Second Circuit (R., 239).

Before the commencement of this action, libel was filed in the United States District Court for the District of Maryland, entitled "Vernon L. Phillips, Jr., by Vernon L. Phillips, his next friend *v.* United States of America, the United States Shipping Board Emergency Fleet Corpora-

tion, now or late owners of the Steamship *West Cape*, and also the Baltimore Steamship Company, a body corporate, operators of said vessel" (R., 49). The proctor for libellant was E. Ridgley Simpson, who was then the attorney for the Baltimore Steamship Company, one of the respondents (R., 48, 59, 61). The amended libel, filed after exceptions to the libel, particularized libellant's claim and expressly specified that his claim for negligence was directed solely against the United States of America in failing to provide a seaworthy ship (R., 49). The amended libel reads as follows:

> "Libellant alleges that the negligence claimed consists in the failure of the respondent, the United States of America, to provide a cleat or socket of proper design and sufficient strength to support the strongback when one end of it was negligently knocked out of place by a load of dunnage being hoisted from the hold; further the officers of the Steamship *West Cape* were incompetent; further that the respondents owe a special duty to Vernon L. Phillips, Jr., because of his youth and inexperience, and libellant claims that in the event that negligence is not established for wages, maintenance and cure" (R., 49).

The cause was heard and resulted in a decree for maintenance and cure for Five Hundred Dollars and the attorneys immediately caused the decree to be marked "Satisfied" (R., 45).

Thereafter action was commenced under the Merchant Marine Act to recover damages for personal injuries; therein the plaintiff alleged and proved that his injuries were due to the negligence of his fellow servants. The United States of America was not a party to this lawsuit (R., 3). Therein the plaintiff recovered a judgment which

has been affirmed by the Circuit Court of Appeals for the Second Circuit upon the authority of *Troxell* v. *Del. L. & W. R. Co.*, 227 U. S., 434 (R., 237). This is the situation of which the petitioner complains.

Summary of the Argument.

The petitioner fails to show special and important reasons for granting the writ.

I. The decision of the Circuit Court of Appeals for the Second Circuit is not in conflict with the decisions of other Circuit Courts of Appeals on the same matter.

II. The law of this case has been settled by the Supreme Court (*Troxell* v. *Del., L. & W. R. Co.*, 227 U. S., 434).

Argument.

The argument of petitioners commences with a statement that in the Baltimore and New York cases the same issues were raised by the pleadings. This is distinctly not so. The libel did not charge the respondents with the negligence of the officers and crew; and the amended libel only charged negligence against the United States of America in failing to provide a cleat or socket of proper design (R., 49).

In the action commenced in the Supreme Court of the State of New York, only the negligence of fellow servants was pleaded; and the United States of America was not a party to this lawsuit (R., 4).

The libel proceeded to a decree for maintenance and cure; and that was really the only issue tried in that proceeding (R., 51).

In the first case the libel alleged in substance, that the

officers of the vessel were incompetent and that the ship was unseaworthy (R., 47-50).

These allegations were not proven; therefore libellant recovered no indemnity.

In the second action, plaintiff made no allegations of incompetency of the officers or unseaworthiness of the ship. He did not repeat in his complaint any of the allegations of the libel. He alleged and proved that his injuries were due to the negligence of his fellow servants and he recovered a verdict for damages for personal injuries due to such negligence. The facts alleged and proved were totally distinct and the causes of action were totally distinct. Therefore, the admiralty decree for maintenance and cure, a right distinct from any right of action for damages for negligence, was not a bar to the second cause of action for damages for negligence of fellow servants.

In *Rolph Navigation and Coal Co.* v. *Kohilas*, 299 Fed., 52, a libel was filed for damages for beatings sustained by Kohilas, a seaman, at the hands of the mate of the *Rolph*. The respondents pleaded and proved that Kohilas had recovered his wages and maintenance for the voyage in another proceeding, and that therefore the prior decree was a bar to the present action.

Hunt, Circuit Judge, on page 54, said:

> "The evidence is in harmony with the conclusion of the District Judge, and as Kohilas has recovered in another proceeding for wages and maintenance, and makes no claim herein for expenses and cure, the principal question presented is whether the vessel can be held liable to an indemnity for injuries in consequence of the hiring and retention of Hansen as mate."

And on page 55:

> "Nor should Kohilas be precluded from recovering because of the fact that in another proceeding for wages and maintenance he recovered. His right to wages, maintenance and expenses of cure existed under any and all circumstances, unless there was wilful misconduct; but his right to recover an indemnity is a separate matter."

This is not a case, as petitioners contend, of splitting a single cause of action into several suits, or dividing an action for personal injuries into several successive actions for different grounds of negligence. Here the plaintiff had two distinct causes of action independent of each other, one for maintenance and cure, and another for damages for personal injuries. He might unite them or separate them if he desired. A judgment upon one cause of action could not be a bar to a suit upon the other. It might as well be argued that a plaintiff could not recover a verdict in an action for damages for personal injuries, because in a prior action he had recovered a verdict against the same defendant in a suit upon a promissory note.

The most that petitioners can claim is that the plaintiff was wrongfully and fraudulently persuaded to pursue a remedy that did not exist. But the fact that he has done so, is not a bar to a suit upon a rightful cause of action.

I.

The decision of the Circuit Court of Appeals for the Second Circuit is not in conflict with the decisions of other Circuit Courts of Appeals on the same subject.

The petitioners base their application for a writ upon the cases of *Columb* v. *Webster Manufacturing Co.* (C. C. A., 1st), 84 Fed., 592, and *Miller* v. *Spokane International Ry. Co.* (C. C. A., 9th), 293 Fed., 748. These authorities are not controlling. It is also argued that they are in conflict with the decision of the Circuit Court of Appeals for the Second Circuit. *Columb* v. *Webster Manufacturing Co.* (84 Fed., 592), which is petitioners' main reliance, was before the Supreme Court in Troxell's case. It was cited by the defendant-in-error. *Miller* v. *Spokane International Ry. Co.*, 293 Fed., 748, was decided upon the authority of *Stark* v. *Starr*, 94 U. S., 477, and that case was also before the Supreme Court and was also cited in Troxell's case. The Supreme Court has considered these decisions and for the purpose of our case has overruled them. It can certainly not be argued that there is a conflict in the decisions of Circuit Courts of Appeals when a late decision in one circuit does not follow decisions in other circuits which have been overruled by the Supreme Court. The interpretation of the law by the supreme tribunal is binding. When the Supreme Court has decided, the conflict must subside; there remains no conflict of inferior decisions.

Moreover, *Miller* v. *Spokane International Ry. Co.*, 293 Fed., 748, and *Stark* v. *Starr*, 94 U. S., 477, and *United States* v. *California & Oregon Land Co.*, 192 U. S., 355, held that a party may not split up a claim or cause of action and prosecute it by piecemeal. But this was not the

situation here. In our case, the plaintiff had a claim for maintenance and cure upon which he recovered. It is true that in his pleading he mixed it up with another theory of action which did not exist. He tried to mingle his claim for wages with a non-existent right of action. That does not bar him from a recovery on another totally distinct and different claim.

II.

Troxell v. Delaware, Lackawanna & Western Railroad Co., 227 U. S., 434, is the law of this case.

In *Troxell* v. *Del., L. & W. R. Co.*, 227 U. S. 434, the action was brought in the Circuit Court for the Eastern District of Pennsylvania under the Federal Employers Liability Act by Lizzie M. Troxell, Administratrix of Joseph D. Troxell, against Delaware, Lackawanna and Western Railroad Co. to recover damages for wrongful death. A verdict was rendered by the District Court in favor of the plaintiff, and reversed by the Circuit Court of Appeals, Third Circuit, and brought to the Supreme Court on writ of error.

The decedent was a fireman in the employ of the defendant. He was killed in a collision between two trains. The day before his death some of the employees of the defendant had shifted a number of gondola cars upon a siding. At this point there was a down grade to the west, and on the day following the shifting of the cars, they started in motion and ran on a track upon which the decedent was driving an eastbound train. He was killed in the collision. The plaintiff brought a prior action against the defendant, stating that the decedent was a fireman in Interstate Commerce and because of the negli-

gence of the defendant in failing to keep its devices and apparatus in good order and condition, the collision occurred. She recovered a verdict which was reversed by the Circuit Court of Appeals. Thereafter she began the present action under the Federal Employers Liability Act. The plaintiff again recovered a verdict and the Circuit Court of Appeals reversed the judgment, holding that the first action was a bar. The record shows that on the first trial the District Judge held that the Federal Act should not be considered in determining the case, and that it was brought under the Statutes of the State of Pennsylvania. In such an action there could be no recovery because of the negligence of the fellow workmen of Troxell. In the first action, the Court held that no question of the negligence of fellow servants was submitted, and the jury was confined to the question of responsibility for failing to provide proper safety appliances to prevent cars from running down the grade in the manner they had, if left unbraked. The Circuit Court of Appeals stated that the case might be brought under the State Act, notwithstanding the Federal Employers Liability Act, and concluded to reverse the judgment. The second action was brought under the Federal Employers Liability Act, under which there might be a recovery for the negligence of the fellow servants of the decedent, and the District Court held that the former case had adjudicated matters as to defects in the cars, engines and rails, and submitted to the jury only the question of the negligence of fellow servants. The plaintiff recovered a verdict which was reversed by the Circuit Court of Appeals on the grounds that the judgment in the first case was a bar; because an action of this kind for injury to one engaged in Interstate Commerce could only be maintained under

the Federal Act, and in the second action the plaintiff was merely offering to prove facts that might have been proved on the first trial. On writ of error to the Supreme Court the judgment of the Circuit Court of Appeals was reversed, Mr. Justice Day delivering the opinion. On page 442, he said:

> "We think it is apparent from what we have said that the first case was prosecuted and tried upon the theory that it involved a cause of action under the State Law of Pennsylvania. It was so submitted to the jury and they were told that they were not to consider the Federal Law, but recovery should be based upon the right under the State Act. If the Circuit Court of Appeals was right in its second decision, that no action could have been maintained under the State Law in view of the Employers Liability Act, the fact that the plaintiff attempted to recover under that law and pursued the supposed remedy until the court judged that it had never existed, would not of itself preclude the subsequent pursuit of a remedy for relief to which in law she is entitled.
>
> "Whether the plaintiff could properly have thus recovered is not the question now before the court. To work an estoppel the first proceeding and judgment must be a bar to the second one because it is a matter already adjudicated between the parties. The cause of action under the State Law if it could be prosecuted to recover for the wrongful death alleged in this case, was based upon a different theory of the right to recover than prevails under the Federal Statute. Under the Pennsylvania Law, there could be no recovery for the negligence of the fellow servants of the deceased. This was the issue upon which the case was submitted at the second trial and a recovery had. Whether the plaintiff

> could recover under the Pennsylvania Statute was not involved in the second action, and the plaintiff's right to recover because of the injury by the negligence of the fellow servants was not involved in or concluded by the first suit."

Troxell's case and the instant case present a deadly parallel.

1. Pursuit of a non-existent remedy does not make the matter *res judicata* when the existent remedy is pursued. This is applicable to both cases. Mrs. Troxell might have brought her first action under the Federal Employees' Act. What she might have done in the first action was not before the court in the second suit. Petitioner says that Phillips might have brought his second cause of action in Baltimore. Whether he might or not, is not the question before the court now.

2. The plaintiff was not estopped by the judgment in the first suit as to matters not tried because not admissible therein. This principle is applicable to the instant case because the negligence proven in the second suit was not pleaded in the first suit and so was not an admissible issue.

3. There was a difference in parties between the widow in her own right, and the widow as administratrix. But Troxell's case was not decided upon that ground. There is a difference in parties in the instant case. In the first proceeding the United States was charged with a breach of duty in furnishing an unseaworthy ship. In the second action, the United States was not a party.

We find in Troxell's case and in Phillips' case, a prior pursuit of a non-existent cause of action.

In the petition and the supporting brief much is said about the great public interest and importance of Phillips' case. True it is important to Phillips; and it is doubtless of great private interest to the petitioners to delay as long as possible the collection of this judgment.

Finally, Section 33 of the Act of June 5, 1920, c. 250, 41 Stat. 988, 1007, and the Act of April 22, 1908, c. 149, 35 Stat. 65, have already been passed upon by the Supreme Court. There is here no question of Federal Law which has not been settled by this Court.

CONCLUSION.

It is respectfully submitted that the petition for writ of certiorari should be denied.

EDGAR J. TREACY,
Solicitor for Respondent.

January, 1926.

Vernon J. Jones

FILED
MAR 30 1927
WM. R. STANSBURY
CLERK

No. 271

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1926

BALTIMORE STEAMSHIP COMPANY and UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION

against

VERNON PHILLIPS, an infant, by VERNON PHILLIPS, his Guardian *ad Litem*

BRIEF FOR THE RESPONDENT

APPEAL PRINTING CO., 32 THAMES ST., NEW YORK CITY

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IN THE

Supreme Court of the United States

OCTOBER TERM—1926.

No. 271.

BALTIMORE STEAMSHIP COMPANY and UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, *Petitioners,*

v.

VERNON PHILLIPS, an infant, by VERNON PHILLIPS, his guardian *ad litem.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT.

Opinion.

The opinion of the Circuit Court of Appeals (R., 117) is reported in 9 F. (2nd) 902.

The Question.

The petitioners have raised the question, whether a decree in admiralty for maintenance and cure is a bar to a later action at law for damages for personal injuries caused by the negligence of fellow servants. The theory of liability upon which the plaintiff recovered a judgment was not before the court in the admiralty proceeding and could not have been litigated under the pleadings therein.

Statement of the Case.

This case has nothing to do with the Federal Employees' Compensation Act. The plaintiff was not a Federal employee. He was a member of the crew of the *West Cape*, a cargo vessel operated by the defendants (R., 41). At the time he signed articles he was eighteen years old and was going to school and working in vacation (R., 42). Although he had never been to sea before, he was put down on the articles as an ablebodied seaman (R., 42). The ship left Baltimore in May, 1921, carrying grain and coal for British ports. Number 1 hold and Number 5 hold were fitted with shifting boards and after the grain had been discharged, the shifting boards were left in, and water taken into the holds for ballast (R., 43, 69). On the voyage home, the rolling of the water ballast knocked down and splintered the shifting boards in these holds. On Sunday, July 24, 1921, when the ship was within a day or two of her home port, the deck crew was set to work taking out the broken lumber from Number 1 hold (R., 70). One section of the hatch was taken off and one strongback was taken out at the main deck and one or two at the 'tween deck hatch; the rest of the strongbacks were allowed to remain in (R., 72). The dunnage was hoisted by a winch on the port side of Number 1 hatch, the second officer acting as winchman (R., 71). After the hoisting had commenced the plaintiff was ordered into Number 1 hold to clean the bilges (R., 44, 45). While he was scooping the grain out of the starboard bilges, the wire fall which had been led into the forward part of Number 1 hold, fouled a strongback, and as the winchman continued to hoist away, the strong-

back was lifted out of its sockets and thrown into the hold upon the plaintiff (R., 46, 73, 74). His left leg was mangled so badly that it was later amputated above the knee (R., 47).

Action was brought in the Supreme Court of the State of New York, Nassau County, and removed to the United States District Court for the Eastern District of New York where the plaintiff recovered a verdict for Forty Thousand Dollars (R., 90). The judgment entered thereon was affirmed by the Circuit Court of Appeals for the Second Circuit (R., 122).

Before the commencement of this action, libel was filed in the United States District Court for the District of Maryland, entitled "Vernon L. Phillips, Jr., by Vernon L. Phillips, his father and next friend *against* the United States of America, the United States Shipping Board Emergency Fleet Corporation and the Baltimore Steamship Company, a body corporate" (R., 101). The proctor for libellant was E. Ridgley Simpson, who was then the attorney for the Baltimore Steamship Company, one of the respondents (R., 102, 22, 23). The amended libel, filed after exceptions to the libel, particularized libellant's claim and expressly specified that his claim for negligence was directed solely against the United States of America in failing to provide a seaworthy ship (R., 103). The amended libel reads as follows:

> "Libellant alleges that the negligence claimed consists in the failure of the respondent, the United States of America, to provide a cleat or socket of proper design and sufficient strength to support the strongback when one end of it was negligently

> knocked out of place by a load of dunnage being hoisted from the hold; further the officers of the Steamship *West Cape* were incompetent; further that the respondents owe a special duty to Vernon L. Phillips, Jr., because of his youth and inexperience. And libellant claims that in the event that negligence is not established for wages, maintenance and cure" (R., 103).

The cause was heard and resulted in a decree for maintenance and cure for Five Hundred Dollars and the attorneys immediately caused the decree to be marked "Satisfied" (R., 99, 100).

Thereafter action was commenced under the Merchant Marine Act to recover damages for personal injuries; therein the plaintiff alleged and proved that his injuries were due to the negligence of his fellow servants. The United States of America was not a party to this lawsuit (R., 2, 3). Therein the plaintiff recovered a judgment which has been affirmed by the Circuit Court of Appeals for the Second Circuit upon the authority of *Troxell* v. *Del., L. & W. R. Co.*, 227 U. S. 434 (R., 117). This is the situation of which the petitioners complain.

Summary of the Argument.

1. One who has unsuccessfully pursued an erroneous or non-existent cause of action, is not thereby precluded from a recovery upon the cause of action brought upon a totally distinct theory of liability; and this is true even in cases where the parties are the same and where similar facts have been established in both proceedings.

The plea of *res judicata* certainly cannot be raised

where the parties are different, where the pleadings are substantially different and where the judgments obtained are in pursuance of distinct and concurrent rights.

2. The law of this case has been settled by the Supreme Court (*Troxell* v. *Del., L. & W. R. Co.*, 227 U. S. 434).

ARGUMENT.

I.

The admiralty decree was not an adjudication of all the plaintiff's rights arising from his injury and it is not a bar to the present action.

The gist of petitioner's argument is that a cause of action may not be split into several parts and portions of it tried at different times. But this is exactly what Phillips has not done. It might be said with a view to precise language that a man may have but one cause of action for damages for personal injuries. But it must also be admitted that he might have several theories of liability. If he chose an incorrect theory and was defeated, as of course he must be, he would not be estopped thereby from a recovery on a correct theory of liability.

An analysis of the proceeding shows that Phillips did not split up a cause of action. It must be admitted that he had two causes of action; one for damages for personal injuries and another for maintenance and cure. He received a decree for maintenance and cure in admiralty. But this was not a bar to the second cause of action for damages for personal injuries received through the negligence of fellow servants.

In *Rolph Navigation and Coal Co.* v. *Kohilas*, 299 Fed. 52, a libel was filed for damages for beatings sustained by Kohilas, a seaman at the hands of the mate of the *Rolph*. The respondents pleaded and proved that Kohilas had recovered his wages and maintenance in another proceeding, and asserted that the prior decree was a bar to the instant action.

HUNT, Circuit Judge, on page 54, said:

> "The evidence is in harmony with the conclusion of the District Judge, and as Kohilas has recovered in another proceeding for wages and maintenance, and makes no claim herein for expenses and cure, the principal question presented is whether the vessel can be held liable to an indemnity for injuries in consequence of the hiring and retention of Hansen as mate."

And on page 55:

> "Nor should Kohilas be precluded from recovering because of the fact that in another proceeding for wages and maintenance he recovered. His right to wages, maintenance and expenses of cure existed under any and all circumstances, unless there was wilful misconduct; but his right to recover an indemnity is a separate matter."

The most that petitioners can argue is that the libellant mingled his claim for maintenance with an improper and incorrect theory of liability for damages for personal injuries. He did not establish the facts necessary to satisfy the theory and his libel as to indemnity was therefore dismissed. If that part of his proceeding amounted to anything, it was at most a pursuit of a non-existent cause

of action. But the fact that he has pursued the supposed remedy until the Court judged that it had never existed, would not preclude the subsequent pursuit of a remedy for relief to which in law he is entitled.

Again we find that the Baltimore and New York suits differ in many respects. The same issues were not raised by the pleadings. The libel did not charge the respondents with the negligence of the officers and crew. Moreover, the libel was amended; and under the rules of pleading, the amended libel superseded the original libel or it limited the libel to a specific and particular claim.

In the amended libel we find the only claim for indemnity is based upon a charge of negligence against the United States of America in failing to provide a cleat or socket of proper design (R., 103). It is true that the amended libel contains a further allegation of incompetence on the part of the officers and of a special duty owed to the libellant because of his youth and inexperience; but these statements are meaningless conclusions. And these were the issues that were tried in the District Court of Maryland between the libellant and the respondent United States of America. The opinion of Judge Rose (*Vernon L. Phillips, Jr.* v. *United States of America*, 286 Fed. 631) plainly shows what was pleaded and proved:

> "The libellant charges negligence on the owners of the ship in that the cleat or socket supporting the strongback was not of proper design or sufficient strength, that the officers of the steamship were incompetent and the respondent owed a special duty to the libellant because of his youth and inexperience."

These allegations were made and attempted to be proved against the United States of America.

In the action commenced in the Supreme Court of the State of New York and removed by the defendants to the United States District Court, only the negligence of fellow servants was pleaded and proved; and the United States of America was not a party to this lawsuit (R., 2).

The libel resulted in a decree for maintenance and cure; and that was the only issue tried in that proceeding (R., 100).

In the action at law, the plaintiff made no allegations of incompetency of the officers or unseaworthiness of the ship. He did not repeat in his complaint any of the allegations of the libel. He alleged and proved that his injuries were due to the negligence of his fellow servants, and he recovered a verdict for damages for personal injuries due to such negligence. The facts alleged and proved were totally different. The theories of liability were different and the causes of action were totally distinct. Therefore, the admiralty decree for maintenance and cure, a right distinct from any right of action for damages for negligence, was not a bar to the second cause of action for damages for negligence of fellow servants.

The petitioners have cited cases wherein it has been held that plaintiff may not split up his demand and prosecute it by piecemeal; or that he may not vary his description of the same act of negligence. There can hardly be a quarrel with these principles; but they have no application to the instant case.

In *Columb* v. *Webster Manufacturing Co.* (C. C. A. 1st), 84 Fed. 592, the plaintiff was injured by a defective trestle.

In his first action he alleged an unsafe place to work, and in his second action, he added to this allegation the incompetence of fellow servants. But his cause of action arose from a defective trestle, and, of course, he could not be allowed to vary it by changing his descriptions of the same act of negligence. This case, which is now petitioners' main reliance, was cited by the defendant-in-error in *Troxell* v. *Del. L. & W. R. R. Co.*, 227 U. S. 434. It was under the consideration of the Supreme Court then and was distinguished, as it is distinguishable here.

In *Miller* v. *Spokane International Ry. Co.* (C. C. A., 9th), 293 Fed. 748, two actions were brought. In one it was alleged that the apron was not rough and in the other that the apron was too short. The negligence, if any, consisted in a defective apron and the plaintiff was only varying his descriptions of the defective apparatus. That case seems to have been decided upon the authority of *Stark* v. *Starr*, 94 U. S. 477, and Stark's case must have been considered by the Supreme Court in Troxell's case. For the purpose of the instant case, it may properly be said that these decisions have been overruled by the supreme tribunal.

In the case at bar, even if it were admitted for the purpose of the argument that the parties were the same as in the admiralty proceeding, yet it is apparent that an unseaworthy ship is certainly different from a negligent servant. They are totally distinct matters. An action for injuries due to a defective cleat or socket (which makes a ship unseaworthy) must proceed upon a theory of liability different from an action to recover damages for injuries caused by the negligence of fellow servants. They

are really different causes of action. A man may have one or the other of them; he may have neither of them; he might possibly have both of them. If he has but one of them, and pursues the other which he has not, he is not thereby estopped from prosecuting the cause of action which he really has. And this is because he has pursued a remedy which did not exist, and he has tried to enforce a nonexistent cause of action. His situation is entirely different from the man who has tried to recover because of his successive claims that the apparatus or appliance was too rough or too smooth or too long or too short or too hot or too cold.

The other cases cited by the petitioners are likewise distinguishable.

Chicago, Rock Island & Pacific R. R. v. *Schendel* (270 U. S. 611) does not aid the petitioners. That decision reaffirms the principle laid down in Troxell's case. Mr. Justice SUTHERLAND, on page 621, said:

> "It remains only to consider the bearing of the Troxell case, *supra,* upon this point. Mrs. Troxell, the widow of a deceased employee, sued the railroad company under a State Statute, for the benefit of herself and minor children, to recover for the death of her husband, resulting from a negligent failure to provide safe instrumentalities. There was a judgment against her. She then brought suit under the Federal Employers Liability Act as Administratrix, averring the negligence of a fellow servant, a ground of recovery which was not available to her in the action under the State Statute. It was held, following the general rule, that the cause of action in the two cases being different, and the issue determined in the first not being involved in the second, there was no estoppel."

It has certainly been laid down in both these cases that an action to recover damages resulting from a negligent failure to provide safe instrumentalities is a totally different cause of action from a suit to recover damages due to the negligence of a fellow servant.

And it has been uniformly ruled that a prior judgment can never be a bar as to matters not within the issues.

In *Griffen* v. *Keese*, 187 N. Y. 454, Judge WERNER on page 464, said:

> "It has been sometimes stated to be the general rule that a judgment is conclusive not only upon the question actually contested and determined, but upon all matters which might have been litigated and decided in the same suit. This is doubtless true of all matters properly belonging to the subject of the controversy and within the scope of the issues. But that is not the rule when the second suit, although between the same parties, is on a different cause of action. In such a case the judgment is not conclusive on all matters which might have been litigated in the former action, but only as to such points or questions as were actually in issue and adjudicated therein. (*Cromwell* v. *Sac Co.*, 94 U. S. 351.)"

And in Phillips' lawsuit the matters in controversy were certainly not within the scope of the issues in the admiralty proceeding. The matters in the lawsuit could never have been litigated in the former proceeding because these questions were not at issue therein. They were not pleaded. They never could have been brought within the scope of the issues framed in the libel or in the amended libel. And never having been at issue, and

never having been litigated, a prior judgment even if between the same parties could not be a bar.

In *Shepard Co.* v. *Taylor Publishing Co.*, 198 App. Div. 638, the defendant Publishing Co. executed a chattel mortgage covering all its property to the defendant Shuart. That mortgage was foreclosed, the property bid in by the mortgagee, and leased to Taylor personally. An action was brought by the plaintiff against the defendants, assailing the validity of the mortgage and its foreclosure upon the charge of common law fraud. The plaintiff was unsuccessful. A second action was brought under Section 66 of the Stock Corporation Law, to secure a judgment declaring void the same chattel mortgage. LAMBERT, J., on page 641, said:

> "The trial court has reasoned that the purpose of the former action and the purpose of this action are identical and that the parties are the same; that the same evidence introduced in the former action was introduced in this action and that, therefore, the issue here was or could have been litigated in the former action and hence that the former adjudication was a bar to this action.
>
> "That the parties are identical and that the ultimate effect of success by the plaintiff in the two actions would be the setting aside of this chattel mortgage and the foreclosure thereof cannot be disputed. However the two actions differ in their issues.
>
> "The former action sought to establish common law fraud. In it, it was essential that the mortgagee should have participated in or had knowledge of the fraud sought to be thereby consummated.
>
> "In this action, common law fraud is not asserted and is not essential to recovery. Section

66 of the Stock Corporation Law declares: 'No conveyance, assignment or transfer of any property of any such corporation * * * nor any * * * lien created or security given by it * * * when the corporation is insolvent or its insolvency is imminent with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid * * *. Every transfer or assignment or other act done in violation of the foregoing provisions of this section shall be void * * *.'

"It is apparent that this statute might be violated under circumstances which would preclude recovery upon the same facts in an action for common law fraud. The common law form of action requires as an essential, scienter on the part of the transferee. It was definitely established in the former action that Mrs. Shuart did not know of such insolvency on the part of the publishing company, and that she acted in good faith so far as she was concerned. That conclusion necessarily precluded judgment for the plaintiff in the first action; but it does not preclude recovery upon the cause of action now invoked. Scienter is not a necessary element in an action predicated upon the statute. The statute declares a sequence of events to work illegality in the transaction and guilty knowledge is not one of its requirements.

"We have, therefore, an instance where a second cause of action differs materially and essentially from the one previously invoked. A case is presented where the same facts lead to judgment for the defendant in the one case and for the plaintiff in the other.

"Under such circumstances, the judgment in the first action is not and cannot be *res adjudicata* in the second."

II.

Troxell v. Delaware, Lackawanna & Western Railroad Co., 227 U. S. 434, is the law of this case.

In *Troxell* v. *Del., L. & W. R. Co.*, 227 U. S. 434, the action was brought in the Circuit Court for the Eastern District of Pennsylvania under the Federal Employers Liability Act by Lizzie M. Troxell, Administratrix of Joseph D. Troxell, against Delaware, Lackawanna and Western Railroad Co. to recover damages for wrongful death. A verdict was rendered by the District Court in favor of the plaintiff, and reversed by the Circuit Court of Appeals, Third Circuit, and brought to the Supreme Court on writ of error.

The decedent was a fireman in the employ of the defendant. He was killed in a collision between two trains. The day before his death some of the employees of the defendant had shifted a number of gondola cars upon a siding. At this point there was a down grade to the west, and on the day following the shifting of the cars, they started in motion and ran on a track upon which the decedent was driving an eastbound train. He was killed in the collision. The plaintiff brought a prior action against the defendant, stating that the decedent was a fireman in Interstate Commerce and because of the negligence of the defendant in failing to keep its devices and apparatus in good order and condition, the collision occurred. She recovered a verdict which was reversed by the Circuit Court of Appeals. Thereafter she began the present action under the Federal Employers Liability Act. The plaintiff again recovered a verdict and the Circuit

Court of Appeals reversed the judgment, holding that the first action was a bar. The record shows that on the first trial the District Judge held that the Federal Act should not be considered in determining the case, and that it was brought under the Statutes of the State of Pennsylvania. In such an action there could be no recovery because of the negligence of the fellow workmen of Troxell. In the first action, the Court held that no question of the negligence of fellow servants was submitted, and the jury was confined to the question of responsibility for failing to provide proper safety appliances to prevent cars from running down the grade in the manner they had, if left unbraked. The Circuit Court of Appeals stated that the case might be brought under the State Act, notwithstanding the Federal Employers Liability Act, and concluded to reverse the judgment. The second action was brought under the Federal Employers Liability Act, under which there might be a recovery for the negligence of the fellow servants of the decedent, and the District Court held that the former case had adjudicated matters as to defects in the cars, engines and rails, and submitted to the jury only the question of the negligence of fellow servants. The plaintiff recovered a verdict which was reversed by the Circuit Court of Appeals on the grounds that the judgment in the first case was a bar; because an action of this kind for injury to one engaged in Interstate Commerce could only be maintained under the Federal Act, and in the second action the plaintiff was merely offering to prove facts that might have been proved on the first trial. On writ of error to the Supreme Court the judgment of the Circuit Court of Appeals was

reversed, Mr. Justice DAY delivering the opinion. On page 412, he said:

> "We think it is apparent from what we have said that the first case was prosecuted and tried upon the theory that it involved a cause of action under the State Law of Pennsylvania. It was so submitted to the jury and they were told that they were not to consider the Federal Law, but recovery should be based upon the right under the State Act. If the Circuit Court of Appeals was right in its second decision, that no action could have been maintained under the State Law in view of the Employers Liability Act, the fact that the plaintiff attempted to recover under that law and pursued the supposed remedy until the court judged that it had never existed, would not of itself preclude the subsequent pursuit of a remedy for relief to which in law she is entitled.
>
> "Whether the plaintiff could properly have thus recovered is not the question now before the court. To work an estoppel the first proceeding and judgment must be a bar to the second one because it is a matter already adjudicated between the parties. The cause of action under the State Law if it could be prosecuted to recover for the wrongful death alleged in this case, was based upon a different theory of the right to recover than prevails under the Federal Statute. Under the Pennsylvania Law, there could be no recovery for the negligence of the fellow servants of the deceased. This was the issue upon which the case was submitted at the second trial and a recovery had. Whether the plaintiff could recover under the Pennsylvania Statute was

> not involved in the second action, and the plaintiff's right to recover because of the injury by the negligence of the fellow servants was not involved in or concluded by the first suit."

Troxell's case and the instant case present an exact parallel.

1. Pursuit of a non-existent remedy does not make the matter *res judicata* when the existent remedy is pursued. This is applicable to both cases. Mrs. Troxell might have brought her first action under the Federal Employees' Act. What she might have done in the first action was not before the court in the second suit. Petitioner says that Phillips might have brought his second cause of action in Baltimore. Whether he might or not, is not the question before the court now.

2. The plaintiff was not estopped by the judgment in the first suit as to matters not tried because not admissible therein. This principle is applicable to the instant case because the negligence proven in the second suit was not pleaded in the first suit and so was not an admissible issue.

3. There was a difference in parties between the widow in her own right, and the widow as administratrix. But Troxell's case was not decided upon that ground. There is a difference in parties in the instant case. In the first proceeding the United States was charged with a breach of duty in furnishing an unseaworthy ship. In the second action, the United States was not a party.

We find in the concluding pages of petitioner's brief in support of the petition for writ of certiorari an excellent

analysis of the decision in Troxell's case (Brief in support of petition, p. 25). It would perhaps have been more accurate had petitioner's counsel stated that the case was not decided upon a difference in parties. But in the attempt to distinguish Phillips' case from Troxell's case, the argument has wandered from the path of logic into the fields of sophistry. This analysis has been omitted from the brief for the petitioners. We feel that it should be supplied, because it compels the conclusion that the cases are identical. If the analysis of Troxell's case contained in the brief in support of the petition for the writ is a correct one, then this judgment should be affirmed.

CONCLUSION.

The judgment should be affirmed.

Respectfully submitted,

EDGAR J. TREACY,
Solicitor for Respondent.

March, 1927.

SUPREME COURT OF THE UNITED STATES.

No. 271.—October Term, 1926.

Baltimore Steamship Company and United States Shipping Board Emergency Fleet Corporation, Petitioners, *vs.* Vernon Phillips, an infant, by Vernon Phillips, his Guardian *ad litem*. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 16, 1927.]

Mr. Justice Sutherland delivered the opinion of the Court.

The respondent, an infant 18 years of age, while employed on board a vessel operated by petitioners, was injured by the fall of a strongback used to support a portion of the hatch, and as a result suffered the amputation of a leg. A libel was filed in admiralty to recover damages in the sum of $15,000 against the petitioners and the United States in the federal district court for the district of Maryland. The libel alleged that the injury was caused by negligence in failing to provide a safe place to work, and to use reasonable care to avoid striking respondent, and by the unseaworthiness and insufficiency of the gear and tackle employed on the vessel. By an amendment, further specifications of negligence were added to the effect that the United States had failed to provide a proper and sufficient gear or socket to support the strongback, that the officers of the vessel were incompetent, and that there was owing to the injured person a special duty because of his youth and inexperience. Libellant prayed that, if negligence should not be established, he have a decree for wages, maintenance and cure. After a trial, the district court held that upon the evidence the accident was not due to the negligence alleged but to the grossly negligent way in which dunnage was taken out of the hold, and that under the decisions no recovery could be had for damages upon that ground. By the decree libellant was denied

full indemnity by way of damages and awarded the sum of $500 as the cost of maintenance and cure; and this amount was paid and the decree satisfied. *Phillips* v. *United States et al.*, 286 F. 631.

Subsequently, this action was brought in the Supreme Court of the State of New York against the petitioners—the United States not being joined—and removed to the federal district court for the eastern district of New York. The complaint alleges negligence on the part of the petitioners and their officers and employees in the control and operation of the vessel and appliances. The allegations of fact as to the way in which the accident happened are substantially the same in both cases. Petitioners answered in the present case, setting up, among other things, the decree in the admiralty case as *res judicata;* and by stipulation of the parties this was argued before trial. The district court at first sustained the plea, but, upon reargument, set aside its order to that effect and held the plea bad. A trial resulted in a verdict and judgment for respondent. The court of appeals affirmed the judgment, holding in respect of the plea of *res judicata* that the second action was based upon a different cause of action. 9 F. (2d) 902. And this presents the sole question for consideration here.

The effect of a judgment or decree as *res judicata* depends upon whether the second action or suit is upon the same or a different cause of action. If upon the same cause of action, the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit between the same parties or those in privity with them, not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented. But if the second case be upon a different cause of action, the prior judgment or decree operates as an estoppel only as to matters actually in issue or points controverted, upon the determination of which the judgment or decree was rendered. *Cromwell* v. *County of Sac*, 94 U. S. 351, 352-353; *United States* v. *Moser*, 266 U. S. 236, 241. There is some confusion in the decisions as to whether the present case should fall within the first or the second branch of the rule, but we are of opinion that the great weight of authority, both in respect of the number of decisions and upon reason, sustains the view that the facts here gave rise to a single

cause of action for damages and that the first branch of the rule applies. In *United States* v. *California & Ore. Land Co.*, 192 U. S. 355, this court announced the general rule to be that a judgment or decree upon the merits concludes the parties as to all *media concludendi* or grounds for asserting the right, known when the suit was brought. In that case a bill had been brought to have certain patents for land issued by the United States declared void on the ground that the lands were within an Indian reservation and, therefore, reserved from the operation of the grant. The land company pleaded in bar that the United States had filed an earlier bill seeking the same relief and that a final decree had been entered dismissing that bill. The only thing which the court could find to distinguish the two suits was that in the latter the United States had put forward a new ground for its prayer, but in both cases it sought to establish its own title to the fee. This court sustained the plea in bar, saying, "But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim. *Fetter* v. *Beale*, 1 Salk. 11; *Trask* v. *Hartford & New Haven Railroad*, 2 Allen, 331; Freeman, Judgments, 4th ed., § 238, 241; and, *a fortiori*, he cannot divide the grounds of recovery. Unless the statute of 1889 put the former suit upon a peculiar footing, the United States was bound then to bring forward all the grounds it had for declaring the patents void, and when the bill was dismissed was barred as to all by the decree." The same general doctrine is stated in *Stark* v. *Starr*, 94 U. S. 477, 485, that "a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible." And see also, *Werlein* v. *New Orleans*, 177 U. S. 390, 398-400.

Here the court below concluded that the cause of action set up in the second case was not the same as that alleged in the first, because the grounds of negligence pleaded were distinct and different in character, the ground alleged in the first case being the use

of defective appliances and, in the second, the negligent operation of the appliances by the officers and co-employees. Upon principle, it is perfectly plain that the respondent suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.

A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. "The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. 'The *thing*, therefore, which in contemplation of law as its *cause*, becomes a ground for action, is not the group of *facts* alleged in the declaration, bill, or indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.*'" *Chobanian* v. *Washburn Wire Company*, 33 R. I. 289, 302.

The injured respondent was bound to set forth in his first action for damages every ground of negligence which he claimed to exist and upon which he relied, and cannot be permitted, as was attempted here, to rely upon them by piecemeal in successive actions to recover for the same wrong and injury *Columb* v. *Webster Mfg. Co.*, 84 F. 592; *Cincinnati, N. O. & T. P. Ry. Co.* v. *Gray*, 101 F. 623, 631; *Smith* v. *Missouri Pac. Ry. Co.*, 56 F. 458; *Payne* v. *N. Y., S. & W. R. R. Co.*, 201 N. Y. 436, 440; *Chobanian* v. *Washburn Wire Company, supra*, pp. 300-304; *Senn* v. *Southern Ry. Co.*, 135 Mo. 512, 519; *Munro* v. *Railroad*, 155 Mo. App. 710, 727; *Schweinfurth, Admr.* v. *Railway Co.*, 60 Ohio St. 215, 230-231; *Berube* v. *Horton*, 199 Mass. 421, 425-426. Many other cases are to the same effect. In the case last cited there was a declaration in an action for personal injuries containing a count at common

law alleging failure to provide a reasonably safe place, and a count under the Employers Liability Act alleging a defect in the ways, works, or machinery. To this declaration, after the expiration of the period of the statute of limitations, an amendment was allowed alleging negligence of the defendant's superintendent as the cause of the same accident. The Massachusetts Supreme Court held that the statute of limitations could not be invoked because the amendment did not state a new cause of action, but was simply another statement of the same cause of action, that cause of action being "the injury under the circumstances under which it took place."

Respondent cites and relies upon *The Rolph*, 299 F. 52; but the case is not in point. There the first action was for wages and maintenance alone. Here, in the first action, negligence causing a personal injury, was distinctly alleged as the primary ground of recovery. The claim for wages, maintenance and cure was purely dependent and contingent.

The judgment of the court below, as shown by its opinion, was based, in the main if not entirely, upon *Troxell* v. *Del., Lack. & West. R. R.*, 227 U. S. 434, which was construed as holding "that it was one cause of action not to furnish safe cars, and another to use safe cars carelessly." The opinion in that case is not to be read as announcing any such general rule. If so, in the light of the foregoing discussion, we now should feel obliged to disaffirm it. But the decision rests upon another and a narrow ground, and its authority must be confined accordingly. Mrs. Troxell as surviving widow prosecuted an action against the railway company under a state statute to recover for the death of her husband as the result of a negligent failure to provide safe instrumentalities. After a judgment against her, she brought a second action as administratrix under the federal Employers Liability Act, alleging as ground of recovery negligence of a fellow-servant. The first case was tried and decided exclusively upon the state law, under which law, as this court said, "there could be no recovery for the negligence of the fellow-servants of the deceased," and, consequently, that ground, it was said, was not and could not be involved in or concluded by the first action,—in other words, as matter of law recovery upon that ground was not open to her in the first action. Obviously, if the court had been of opinion that a recovery upon that ground of negligence could have been had in

the action prosecuted under the state law, the decision would have sustained the view that there was but one cause of action.

Whether the later decision in *Wabash R. R.* v. *Hayes*, 234 U. S. 86, 90, has rendered doubtful the soundness of this conclusion even as thus narrowly limited (see *Delaware, L. & W. R. Co.* v. *Yurkonis*, 220 F. 429, 433), we do not pause to consider. It is enough to say that here, as we shall proceed to show, both actions were brought under the same federal law, and the basis upon which the *Troxell* decision rested is entirely lacking.

The injury to respondent occurred after the passage of the amendment of § 20 of the Merchant Marine Act by § 33, c. 250, 41 Stat. 988, 1007, which provides: "That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . ." That amendment incorporates into the maritime law the provisions of the federal Employers Liability Act, c. 149, 35 Stat. 65; and the effect by virtue of § 1 of that Act is to give a right of action for an injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of the ship, as well as for an injury or death resulting from defects due to negligence, etc., and irrespective of whether the action is brought in admiralty or at law. *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375; *Engel* v. *Davenport*, 271 U. S. 33; *Panama R. R. Co.* v. *Vasquez*, 271 U. S. 557.

It follows that here both the libel and the subsequent action were prosecuted under the maritime law, and every ground of recovery, open to respondent in the second case, was equally open to him in the first. But evidently in the first proceeding both court and counsel misinterpreted the effect of § 33, and proceeded upon the erroneous theory, that in admiralty the rule laid down in *The Osceola*, 189 U. S. 158, 175,

"That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident,"

was still in force. Otherwise, it is quite apparent from the language of the opinion that an amendment would have been sought

and allowed, pleading the ground of negligence afterwards set up in the second action. Nevertheless, the cause of action was one and indivisible, and the erroneous conclusion to the contrary cannot have the effect of depriving the defendants in the second action of their right to rely upon the plea of *res judicata.* Plaintiff's claim for damages having been submitted and passed upon, the effect of the judgment in the admiralty case as a bar is the same whether resting upon an erroneous view of the law or not. A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause. *Colburn* v. *Woodworth*, 31 Barb. (N. Y.) 381, 384; *Wolverton* v. *Baker*, 86 Cal. 591, 593; *Bettys* v. *The C. M. & St. P. R. Co.*, 43 Iowa 602, 604; *Bancroft* v. *Winspear*, 44 Barb. (N. Y.) 209, 215-216; *Winslow* v. *Stokes*, 48 N. C. 285.

The conclusion that the judgment below must be reversed cannot be avoided without subverting long established principles of general application, which we are not at liberty to set aside for a special case of hardship.

Judgment reversed.

Mr. Justice STONE concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.